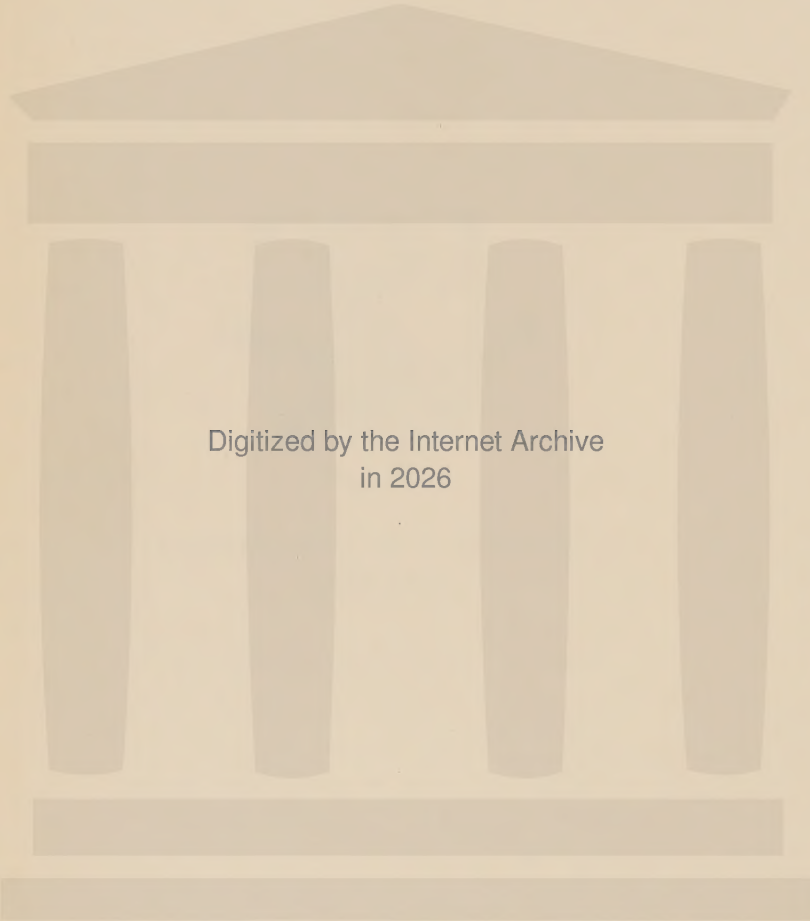




UNIVERSITY OF LONDON
LIBRARY.



Digitized by the Internet Archive
in 2026

THE BRITISH YEAR BOOK OF
INTERNATIONAL LAW

THE
BRITISH YEAR BOOK OF
INTERNATIONAL LAW
1961

THIRTY-SEVENTH YEAR OF ISSUE

*Issued under the auspices of the
Royal Institute of International Affairs*

OXFORD UNIVERSITY PRESS
LONDON NEW YORK TORONTO

1962

Oxford University Press, Amen House, London E.C.4

GLASGOW NEW YORK TORONTO MELBOURNE WELLINGTON

BOMBAY CALCUTTA MADRAS KARACHI LAHORE DACCA

CAPE TOWN SALISBURY NAIROBI IBADAN ACCRA

KUALA LUMPUR HONG KONG

© *Royal Institute of International Affairs 1962*

PRINTED IN GREAT BRITAIN



Editors

PROFESSOR SIR HUMPHREY WALDOCK
PROFESSOR R. Y. JENNINGS

Editorial Committee

LORD McNAIR (Chairman)
DR. M. E. BATHURST
DR. G. C. CHESHIRE
J. E. S. FAWCETT
SIR GERALD FITZMAURICE
SIR CECIL HURST
DR. C. W. JENKS
PROFESSOR D. H. N. JOHNSON
DR. F. A. MANN
DR. J. H. C. MORRIS
THE RIGHT HON. P. J. NOEL-BAKER
DR. C. PARRY
SIR FRANCIS VALLAT
SIR RICHARD WILBERFORCE
PROFESSOR B. A. WORTLEY
LORD WRIGHT

Editorial Communications should be addressed to:

THE SECRETARY,

THE BRITISH YEAR BOOK OF INTERNATIONAL LAW,

ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS,

CHATHAM HOUSE,

10 ST. JAMES'S SQUARE, LONDON, S.W. 1.

The Editors, the members of the Editorial Committee and the Royal Institute of International Affairs do not make themselves in any way responsible for the views expressed by contributors, whether the contributions are signed or not.

CONTENTS

HERSCH LAUTERPACHT—THE SCHOLAR AS JUDGE: I By SIR GERALD FITZMAURICE	1
---	---

THE INTERPRETATION OF PLURILINGUAL TREATIES BY INTERNATIONAL COURTS AND TRIBUNALS By DR. J. HARDY	72
--	----

✓ STATE CONTRACTS IN INTERNATIONAL LAW By PROFESSOR R. Y. JENNINGS	156 ✓
---	-------

✱ THE USE OF FORCE IN SELF-DEFENCE By DR. I. BROWNLIE	183 ✓
--	-------

THE LEGAL LIMITS TO THE USE OF FORCE BY SOVEREIGN STATES: UNITED NATIONS PRACTICE By DR. R. HIGGINS	269 —
--	-------

✓ THE COURT OF THE EUROPEAN COMMUNITIES: JUDICIAL INTERPRETATION AND INTERNATIONAL ORGANIZATION By J. F. McMAHON	320
---	-----

UNITED NATIONS FORCES: SOME LEGAL PROBLEMS By FINN SEYERSTED	351 —
---	-------

PROFESSOR MANLEY OTTMER HUDSON (1886–1960) By LORD McNAIR	476
--	-----

NOTES:

The European Convention on International Commercial Arbitration. By P. I. BENJAMIN	478
--	-----

The <i>Santa Maria</i> : Rebels or Pirates. By PROFESSOR L. C. GREEN	496
--	-----

Doctrinal Aspects of the Universality of the Law of Nations. By PROFESSOR C. H. ALEXANDROWICZ	506
---	-----

✱ Claims by International Organizations in Respect of Injuries to their Agents. By M. J. L. HARDY.	516
--	-----

The 1960 Elections to the International Court of Justice. By J. L. SIMPSON	527
--	-----

✱ <i>Lawless v. The Government of Ireland (Second Phase)</i> . By A. H. ROBERTSON	536
---	-----

DECISIONS OF BRITISH COURTS DURING 1960–1 INVOLVING QUESTIONS OF PUBLIC OR PRIVATE INTERNATIONAL LAW:

A. <i>Public International Law</i> . By DR. D. W. BOWETT	548
--	-----

B. <i>Private International Law</i> . By P. B. CARTER	557
---	-----

REVIEWS OF BOOKS:

McNAIR, LORD: <i>The Law of Treaties</i>	563
--	-----

<i>Académie de Droit International de la Haye: Recueil des cours</i> , 1959, vols. 96, 97 and 98	569
--	-----

<i>Académie de Droit International de la Haye: Recueil des cours, 1960, vols. 99, 100 and 101</i>	576
<i>XXth Century Comparative Law and Conflicts of Law: Legal Essays in Honor of Hessel E. Yntema</i>	581
BERNHARDT, R., and GECK, W. K.: <i>Fontes Juris Gentium, Series A, Sectio 1, Tomus 5</i>	583
FABELA, I.: <i>Intervention.</i>	584
KASME, B.: <i>La Capacité de l'Organisation des Nations Unies de conclure des traités</i>	586
LECA, J.: <i>Les Techniques de revision des conventions internationales</i>	587
REMEC, P. P.: <i>The Position of the Individual in International Law according to Grotius and Vattel</i>	588
ROBERTSON, A. H.: <i>The Law of International Institutions in Europe</i>	589
SHARP, W. R.: <i>Field Administration in the United Nations System</i>	590
SCHNORR, G.: <i>Das Arbeitsrecht als Gegenstand internationaler Rechtsetzung</i>	593
SEEGER, R.: <i>Le Statut personnel des étrangers ennemis et la Convention de Genève du 12 août 1949 relative à la protection des civils</i>	594
TABLE OF CASES	597
INDEX	601

HERSCH LAUTERPACHT— THE SCHOLAR AS JUDGE.* PART I¹

By SIR GERALD FITZMAURICE
Judge of the International Court of Justice

DIVISION A: INTRODUCTION

LAUTERPACHT AND THE WORK OF THE INTERNATIONAL COURT IN GENERAL

I

THE present study is an attempt to do for the judicial side of Sir Hersch Lauterpacht's work what Dr. C. Wilfred Jenks, in a memorable contribution to this *Year Book* for 1960, did for his work as scholar, professor, writer, publicist, editor and codifier. The contribution now being made constitutes the first part of this study, which it is hoped to complete by a second part in this *Year Book* for 1962.

Lauterpacht (as he will henceforth be called) had only served a little over five years on the International Court of Justice when death cut short his life at the early age of 62. He had not then even completed his first term of office of nine years.² There is little doubt that had he done so, he would have wished to stand for a second term and, on being nominated, would certainly have been re-elected. Even if he had not served the whole of such a second term, the total length of his connexion with the Court, had his health not failed him as it did, would have been of the order of three times what it actually was. It is only necessary to look at what he was able to accomplish during that brief period³ in order to realize the measure of the loss to the judicial sources of international law that resulted from his untimely end. It is in the hope of giving some idea of the extent both of that achievement, and, in consequence of that loss, that this article is written.

* © Sir Gerald Fitzmaurice, 1962. The title of this article was suggested by that of Dr. C. Wilfred Jenks in this *Year Book* for 1960: 'Hersch Lauterpacht—the Scholar as Prophet'. Lauterpacht's judgments and judicial opinions are full of the evidences of his scholarship. It may be mentioned that the text of the present article was unfortunately complete before the author had the advantage of seeing Mr. Shabtai Rosenne's article on 'Lauterpacht's Concept of the Task of the International Judge' in the *American Journal of International Law* for October 1961—a matter more particularly considered in § 1 of Division B I below. It is a matter of much gratification to the present writer to find how many of the points made and the views expressed in Mr. Rosenne's noteworthy article are in harmony with those contained in his own contribution—subject, of course, to differences of emphasis and approach.

¹ See below, p. 11.

² He was elected in the autumn of 1954 to a nine-year term of office commencing in February 1955, and died in May 1960.

³ Rendered still briefer by absence through illness from November 1959 to April 1960 when he returned to the Court for a brief period before his final illness overtook him.

The brevity of the period, and the nature of the achievement, are underlined by two other factors. An international jurist in the position that Lauterpacht was in at the time of his election might well have been forgiven had he hesitated to accept the appointment, despite its great prestige and importance. A judge in the average domestic forum would in any one year hear scores, possibly hundreds of cases.¹ The International Court in the same period will, on an average, hear two, three or four. Even its predecessor the Permanent Court of International Justice which, for various reasons not germane to the present subject, had more work, only heard some six or seven cases a year. This does not, of course, mean that the Court only has a few weeks' work in the year. The length and complexity of the memorials and the written pleadings; the frequently voluminous nature of the documentation; the length of the oral hearings, sometimes lasting several weeks in the given case; the almost invariably lengthy deliberations of the Court itself, subsequent to the oral hearing and preparatory to producing the decision, which may last up to as much as two months, and seldom last less than six weeks; and the necessity of intensive private study and research on the part of the individual judges—all this ensures that the post of judge on the Court is no sinecure. It nevertheless remains the fact that only two or three times a year will a judge have an opportunity of, so to speak, self-expression in published form; less frequently in practice, for if he agrees both with the findings of the majority of the Court, and also with the supporting reasons, he will have no occasion to deliver any individual opinion. At the same time, partly because of certain provisions of the Statute of the Court, partly because of unwritten conventions, he may be precluded from any but limited other forms of self-expression in the international field during his tenure of office.

Lauterpacht was well aware of all this; and for a man of his roving and inquiring mind, strongly creative impulses, and steady record of wide-ranging productive work, translation to the more limited if highly important field of the Court may be likened in a certain sense to the case of a busy man of affairs who feels suddenly called upon to take the monastic vow. Nor is the simile (which in any case implies no disparagement of the Court or its function) as far fetched as it might seem; for on the subject of the judicial function in the field of international law and relations, Lauterpacht was a dedicated man. Repeatedly in his writings and teachings he had emphasized the supreme importance of this function, and the absolute necessity, if the rule of law was to prevail in the international sphere, for States to be willing to submit their disputes to judicial settlement by a tribunal which

¹ Even in national supreme courts such as the House of Lords, the Judicial Committee of the Privy Council, the Supreme Court of the United States, or the French Cour de Cassation, there are a large number annually.

would adjudicate them on a purely legal basis. No wonder that, given the chance of contributing to the realization of this ideal by joining the one tribunal of an international character that is above all in a position to fulfil such a role, he grasped it immediately, even at the sacrifice of a number of personal and private interests.¹

The fleeting character of Lauterpacht's opportunity on the Court is further underlined by the fact that he was not even able to participate in all of the cases decided during his five years of office. When he first joined, the Court had before it the substantive phase of the *Nottebohm* case; but because of a personal factor that might have been thought to affect his impartiality in regard to this case,² he felt obliged to stand down. Again, illness, and eventually death, prevented him during the last six months of his life from participating in the final, deliberative stages of two cases, the *Indian Rights of Passage* case (merits) and the Advisory Opinion in the *Inter-governmental Maritime Consultative Organisation* case, although in each case he had participated at the stage of both the written pleadings and the oral hearing.³

The decisions in which Lauterpacht was able to participate fully were thus only ten, in eight of which he delivered a separate or dissenting opinion or declaration.⁴ With regard to the latter group, this is perhaps the moment at which to correct an impression to which some validity may seem to be lent by the extent and weight of the separate views that Lauterpacht delivered in these eight cases—namely, that he was a sort of habitual dissident, perpetually at variance with the majority of his colleagues. He certainly did differ on various points of substance, some of them of the first importance, and also on certain questions of attitude, approach and methods of reasoning. But an analysis of the cases shows conclusively that there is no real warrant for the impression referred to above. In two of the ten cases,⁵ Lauterpacht not only agreed with the findings of the Court, but

¹ It was no easy matter for Lauterpacht to give up his editorship of *Oppenheim* and of the *British Year Book of International Law*; the Whewell Professorship of International Law at Cambridge, and his membership of the International Law Commission of the United Nations; to say nothing of his freedom to write on any legal subject that he felt strongly interested in.

² His son, Mr. E. Lauterpacht, was one of the Counsel engaged in the case.

³ Taken ill in November 1959 during the oral hearing in the *Rights of Passage* case, he was unable to participate in the production of the Judgment. He was able to attend the oral hearing in the *I.M.C.O.* case, but collapsed before the end.

⁴ The ten were, in chronological order, the following, of which the eight in which Lauterpacht delivered a separate or dissenting opinion or declaration are asterisked: *1. The *South-West Africa Voting Procedure* case, 1955 (sep. op.); *2. The *South-West Africa Oral Petitions* case, 1956 (sep. op.); 3. The *I.L.O. Administrative Tribunal (U.N.E.S.C.O.)* case, 1956; *4. The *Norwegian Loans* case, 1957 (sep. op.); *5. The *Interhandel* case (interim measures), 1957 (sep. op.); 6. The *Indian Right of Passage* case (jurisdiction), 1957; *7. The *Guardianship of Infants* case, 1958 (sep. op.); *8. The *Interhandel* case (jurisdiction), 1959 (diss.); *9. The *Aerial Incident (El Al)* case, 1959 (joint diss.); *10. The *Sovereignty over Certain Frontier Land* case, 1959 (diss. dec.).

⁵ See the non-asterisked cases in note 4 above.

concurred also with the full text of the judgment or advisory opinion concerned, and did not append any separate or individual views at all. In a further five cases,¹ he agreed with the substantive findings of the Court, but appended a separate opinion giving his own reasons for doing so. If these reasons differed in a number of significant respects from those of the Court, the fact remained that he was in agreement with the Court as to the operative decision.² In only three cases, therefore,³ did he entirely dissent, not only as to reasons but on substance. Even so, it was only in two of these three cases⁴ that he delivered an individual dissenting opinion or declaration: in the third⁵ he joined with two other judges in a jointly dissenting opinion.

This is the record of a man with a highly individual point of view, but not that of anyone with an ingrained love of non-conformity as such. The truth is, however, that it would be idle to expect a man of Lauterpacht's nature not to express individual opinions in most of the cases he participated in, even if (as in seven out of ten) he concurred in the actual conclusions of the Court. Quite apart from the independence of his character, he would be impelled by the habits of a lifetime to state his views in his own words and in his own way.⁶ Added to that, was the strength with which he entertained certain general views about the nature of the judicial function and the position of the Court in regard to it, to which he felt he must give expression, irrespective of whether these directly affected the conclusions to be reached on the substantive outcome of the case. Furthermore, as a member of the Court, it was broadly only within the limits of his individual judgments and opinions that he could now give expression to the creative ideas of which his genius never lacked an abundant supply.

2

In estimating the contribution that Lauterpacht in the course of his brief period of service as a judge of the International Court, was able to make to the elucidation and development of international law, two decisions—namely, those in the *Administrative Tribunal (U.N.E.S.C.O.)* case, and the *Indian Land Passage* (jurisdiction) case—must necessarily be left out of account, for the reason that, while participating in

¹ See those marked 'sep. op.' n. 4, p. 3.

² However, it is the fact that in some of these cases, such as the *Norwegian Loans* and *Guardianship of Infants* cases, while agreeing with the substantive finding of the Court, he differed rather conspicuously about the reasoning; and in two others (the *South-West Africa* cases) in which he differed neither on substance nor—entirely—on reasoning, his approach was sufficiently individual to cause him to stand apart.

³ See those marked 'diss.', 'diss. dec.' or 'joint diss.' in n. 4, p. 3.

⁴ See cases marked 'diss.' or 'diss. dec.' in *ibid.*

⁵ See case marked 'joint diss.' in *ibid.*

⁶ Other judges of the Court, with a different background, have not been subject to the same impulsions, and if they were able to agree with the substance of the decision, might be content to subscribe generally to the reasoning in support of it.

those decisions (and indeed fully concurring both in the substantive conclusions and the reasoning of the Court) Lauterpacht, precisely because of that, did not deliver any separate opinion of his own; and it would clearly be invidious to discuss in relation to the contribution of a particular judge, work which must be regarded as representing the joint effort of the Court as a whole, or of a substantial majority of it.¹ It can, of course, be surmised that, in these cases, Lauterpacht would have played a prominent part in the formulation and drafting of the decision; and the *Indian Land Passage* case affords a particularly valuable analysis of an important type of question affecting the compulsory jurisdiction of the Court—a subject in which he took a particular interest. For this, Lauterpacht can, in conjunction with his colleagues, be given full credit: it is not, however, possible to attribute any greater share in the matter to him than to them.

Any estimate of Lauterpacht's contribution must therefore rest largely on the seven cases in which he delivered a separate or dissenting opinion or declaration, namely the *South-West Africa Voting Procedure* and *Oral Petitions* cases, the *Norwegian Loans* case, the *Guardianship of Infants* case, the *Frontier Lands* case and the two phases of the *Interhandel* case—to which may reasonably be added, as an eighth, the *Aerial Incident (El Al)* case, in which, although he was joined by two of his colleagues in delivering a jointly dissenting opinion, there are good reasons for regarding the drafting of the Opinion, at any rate, as deriving principally from his pen.²

It is believed that no one who studies these seven Opinions—few in number though they are—can fail to agree that Lauterpacht exhibited in his judicial, as in his other work, that pre-eminence, and those same qualities that made him (in the eyes of all who had any real professional or human contact with him) the great man that he undoubtedly was, and this quite irrespective of whether these opinions were objectively correct or incorrect in their conclusions.

The judicial function is, of course, a specialized one. It does not necessarily follow that the distinguished jurist or the distinguished advocate will make a good judge; just as it is equally the case that some of the best judges have been drawn from the ranks of persons relatively undistinguished in other fields of legal work. There exists, in short, the distinctively judicial mind; and of Lauterpacht's mind it would probably have been said, before he joined the International Court, that its natural bent lay in the direction

¹ For reasons to be stated later, the Joint Dissenting Opinion which Lauterpacht participated in, together with two other judges, in the *Aerial Incident (El Al)* case, can reasonably be regarded as reflecting views specifically of the kind he normally held.

² The Opinion was conspicuously exhaustive, and this was a characteristic of all Lauterpacht's opinions. It is also full of expressions, phraseology and turns of speech that were peculiarly his.

of the exposition rather than of the application of the law. It is, however, but a step from the exposition of the law in general to its exposition in relation to a particular case—though not a step that all are capable of taking with equal success. Lauterpacht had, as it happened, already shown in marked degree the ability, not only to perceive and to formulate legal principles, but also to apply them to highly concrete novel situations in the international field.¹ He had also in his writings repeatedly emphasized the supreme importance of the judicial function in that field; and further, the unworkability of many legal principles (however meritorious *in se*) unless they could be subjected to the discipline and test of adjudication in particular cases. It is therefore scarcely surprising that when his great talents were brought to bear on specifically judicial work, they should have produced results no less outstanding than those which he had achieved as professor, as writer and publicist, as editor, and as codifier. He was just as much a natural applier of the law as he was a formulator or expounder of it. What can truthfully be said is that formulation and exposition were his normal methods of *expression*. But nobody should be led by the form which his judgments and judicial opinions almost invariably took into the error of supposing that they did not also constitute extremely pertinent applications to the particular facts of the case, of the rules and principles he so lucidly expounded. They did; and the reader can only be struck by the way in which, after perhaps some considerable preliminary brandishing, his hammer hits the nail time after time squarely on the head. Nor was the preliminary brandishing by any means confined to theoretical considerations, for in greater measure than almost any of his colleagues—and in as great measure as some of the most practically minded of his predecessors—would he cite judicial precedent, national and international; quote from *procès-verbaux*; review international practice, both of States and international organizations; and richly illustrate his meaning by examples concrete and hypothetical—in short, build up his view by the sheer weight of material; for as a judge Lauterpacht never ceased to be a scholar.² His opinions teem with ideas—and with illustrations and applications of ideas—all firmly grounded in a foundation of legal principle. One is not obliged always to agree, because some of the issues involved were highly controversial, and, as he (always the fairest of controversialists) would have admitted and did constantly admit, these issues were legitimately open to more than one possible conclusion. But be that as it may, one can never fail to pay homage to the cogency—or, where complete cogency was lacking—the almost overwhelming persuasiveness, with which his views were presented.

¹ A high proportion of the articles which he contributed to the *British Year Book of International Law* during the ten years (1944–54) when he was editing it are of this kind.

² Attention will be drawn to some of the most striking of these passages in a second article (see opening paragraph above).

Lauterpacht was, moreover, very much of a realist in the sense that he constantly looked to substance rather than to form. An outstanding example of this will be found below under § 2 of Division B I, in the line he took in the *Guardianship of Infants* case.¹

If the quality of mercy is not strained, neither can that of judicial eminence be subjected to any finite analysis, although mercy is certainly one of its ingredients. In his judicial work, Lauterpacht exhibited the same broad sense of humanity as had characterized all his previous work and outlook. In the last analysis, no judge lacking in humanity can be great as a judge, no matter what the virtuosity and legal merits of his findings. Other qualities of the great judge, pre-eminently possessed by Lauterpacht, were courage (he frequently took a very unpopular line); insight; breadth of outlook; learning, grasp of principle and the capacity to apply it to the facts of the case in hand; the ability to temper law with justice, and yet at the same time to do justice within the discipline and confines of the law.

It is the aim of the whole of the present study to illustrate these themes from his judgments and opinions as they were formulated by him, but perhaps this is as good a place as any to pay special attention to one or two of his outstanding qualities, not only as a judge but as a man. There was, for instance, his almost invariably scrupulous fairmindedness. He was always fair, in the first place to any counter-arguments that could be urged against the view he took; and even if, in a certain sense, these were often set up by him mainly for the purpose of being knocked down again, they were at least recognized and fully considered; moreover, Lauterpacht would not infrequently modify or qualify his view in the light of his own statement of them.

Secondly, he was always fair to the party against whom (or against whose contentions) he proposed to find. He seldom allowed his conclusion on the case as a whole to colour his views on particular aspects of it. On the contrary, he was always very careful, even if he found against a particular party or contention, to indicate also in what respects he thought that party, or some other contention advanced in the same behalf, to be right. Various instances of this could be given, but, for the present, one example of an outstanding character will suffice. Lauterpacht was not a member of the Court at the time of the Court's original and basic Advisory Opinion of July 1950, on the question of the Mandate for South-West Africa; but he did participate in both the subsequent cases on that subject, the *Voting Procedure* and *Oral Petitions* cases. It is quite clear, despite the temperate language he always used (and it would in any case have been clear from his lifelong general outlook), that South Africa's racial policies were abhorrent to him. In addition, he thought and said that the Union was in definite breach of the terms of the Mandate. Yet this did not prevent him from

¹ See below, p. 24.

scrupulously giving the Union its full due whenever, in his opinion, this was called for.

In the first place he insisted (this is dealt with in § 1 of Division B I below, under the head of Lauterpacht's conception of the judicial function)¹ that South Africa's basic arguments of substance must be fully considered, and, if not accepted, must be fully answered; and that they must not be avoided (as he considered the Court was doing) by arriving at a conclusion on quasi-procedural technical grounds.

Secondly, whilst finding against the Union's view on the basic substantive issues, Lauterpacht went out of his way to concede a number of important points in the Union's favour.

This attitude may be illustrated by reference to the *Voting Procedure* case. It will be recalled that in its original Opinion of July 1950, the Court, while finding that the Mandate for South-West Africa was still in force, and that the General Assembly of the United Nations was entitled to exercise in respect of it the supervisory functions formerly exercised by the Council of the League, had qualified this last finding by adding² (for reasons given) that

'The degree of supervision to be exercised should not . . . exceed that which applied under the Mandates System, and should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations.'

In other words, the system must not operate more onerously for the mandatory Power than it did previously, nor must it operate through procedures foreign to its original method of operation. In the *Voting Procedure* case, the question (having regard to the fact that the League Council took decisions on a basis of unanimity) was whether, if the United Nations Assembly decided all questions relating to the Mandate by means of its ordinary voting rule (i.e. by either a simple or a qualified majority, according to the case), these qualifications would be contravened, both because the procedure would be different, and because a unanimity voting rule was less onerous for the Mandatory, since it made it much less easy for any decision to be taken adverse to the Mandatory's views.

The Court disposed of the matter very simply by finding first (*I.C.J. Reports*, 1955, p. 72) that the phrase 'degree of supervision' in the passage above cited from its 1950 Opinion related only 'to the extent of the substantive supervision thus exercised, and not to the manner in which the will of the General Assembly is expressed'; and secondly (*ibid.*, pp. 75 et seq.) that the words 'as far as possible' in the same passage were meant precisely (*inter alia*) to allow the application of its own normal voting rules by the Assembly which, in the Court's view, was in any case precluded by the Charter from applying any other.

¹ See below, pp. 14 et seq.

² *I.C.J. Reports*, 1950, at p. 89.

Lauterpacht disagreed with the first of these findings, and had certain reservations on the second,¹ but in any case he thought that both findings failed to deal with the underlying issues of substance involved. He, too, found against the Union's view, but on two quite different grounds: he considered (i) that the League's procedure in supervising the mandates system had *not* in fact been based fully and strictly on a unanimity voting rule; (ii) that even if it was the case that the United Nations Assembly had no option to apply any but its majority voting rule, this did not in practice result in creating a more onerous situation for the Mandatory, since, if decisions adverse to the Mandatory were harder to arrive at under the League system, they were, when arrived at, binding on the Mandatory; whereas Assembly resolutions, whatever their force and moral weight, were technically only recommendations, and could not formerly bind the Mandatory, which retained a discretion as to carrying them out—albeit one that must be exercised in good faith.²

Lauterpacht rejected the view that the phrase 'degree of supervision' did not relate to procedural matters, or to the means whereby supervision was exercised. The more effective the means, for instance, the greater the degree of supervision. He agreed, with certain hesitations, that at any rate in the instant case, the Assembly could not do otherwise than apply its normal voting rule, but indicated that, for this very reason, he might feel bound to find that the application of the Assembly's rules *would* create a more onerous situation for the Mandatory, and therefore not be in conformity with the Court's 1950 Opinion, were it not for his further point about the non-obligatory character of Assembly decisions.

In Extracts (A) on pp. 12–14 below, there are given a number of passages from Lauterpacht's separate Opinion in the *Voting Procedure* case, designed not to cover anything approaching the full extent of his argument, but to show the peculiarly fairminded nature of his approach to South-West Africa's case.

Next, there was the basic humanity of Lauterpacht's outlook. No more is needed to illustrate this than the two following excerpts from his Judgment in the *Guardianship of Infants* case (*I.C.J. Reports*, 1958, p. 90).

'The second preliminary question is whether legislation relating to protective upbringing of children is properly comprised within the sphere of *ordre public*, that is to say, whether, notwithstanding any apparent treaty provision to the contrary, *ordre public* covers exceptional measures for the protection of minors in addition to and to the exclusion of guardianship operating in normal circumstances. That question must clearly be answered in the affirmative. Apart from criminal law, it is difficult to conceive

¹ While considering that the Assembly could certainly not act on a basis that would subordinate decisions to the requirement of unanimity, he did not rule out the possibility that, in some cases, an international organization might properly apply a voting procedure other than its own. This point will be considered in next year's article.

² As to this, see § 5 of Division B I below, p. 35.

of a more appropriate and more natural object of *ordre public*, as generally understood, than the protection by the State of infants, especially when they are helpless, ill, an actual or potential danger to themselves or to society, a legitimate object of its compassion and assistance, and an occasion for public resentment whenever the State fails to measure up to its responsibilities in this respect. There are, in that wide and highly controversial province of *ordre public*, matters which are the object of uncertainty and occasional exaggerations of national prejudice reluctant to apply foreign law. But there is a hard core within that field which is not open to reasonable challenge. The protection of children, in the sense indicated above, is an obvious particle of that hard core. Mention may be made in this connection, as emphasizing this aspect of guardianship (which is exemplified, in its wider sense, in the system of protective upbringing), of the fact that in English law the Crown as the *parens patriae*—the parent of the country as a whole—is the supreme guardian of infants and, through its Courts, exercises its authority in this respect, at every stage, with total disregard of any artificial formalities of the law. The Guardianship Act of 1925 provides in Section I that, when in proceedings before any court custody or upbringing of an infant are in question, the Court in dealing with the matter “shall regard the welfare of the infant as the first and paramount consideration” and shall not decisively take into account any claim based on any particular rule of law, of the father or the mother to a superior right of custody and control.’

And p. 98:

‘Neither is it easy to follow the second reason advanced by the Dutch Government in the sense that the necessary territorial connection is lacking, seeing that this is a “transfer case”, namely, that if only the transfer of the child to Holland were made possible in accordance with the Convention, then there would be no question of anything happening on Swedish territory which is contrary to Swedish *ordre public*. There is no more force in this argument than in the suggestion that a State has no reason to refuse to hand over a political refugee to prosecution and persecution in a foreign country considering that such prosecution and persecution will take place in foreign territory. Yet it is apparent that in cases such as these the very fact of intended transfer is decisive for the purpose of relying upon *ordre public* seeing that the transfer is deemed contrary to the fundamental notions of public law of that State and that it may be productive of a revulsion of public opinion as being flagrantly offensive to national conceptions of decency. Public opinion is not easily reconciled to the view that the moral and social responsibility of the State has been discharged by the simple device of removing to a foreign country the object of possible persecution and suffering. This would be too easy a means of salving the conscience. When, therefore, it is argued that a “removal case” is not sufficiently connected with the country of the forum to warrant the application of *ordre public*, the correct answer is probably that there are very few occasions in which the connection is more obvious.’

A third outstanding characteristic of Lauterpacht’s was his courage. He was never deterred from carrying out what he conceived to be his essential task as a judge by the fact that he might well be compelled to take an unpopular line, not only with his colleagues, or some of them, but with certain strata of opinion outside the Court. His line over South-West Africa illustrates this; so do the points discussed in § 1 of Division B I

below.¹ The supreme example was the line he took over the effect of the so-called 'automatic' type of reservation and declaration accepting the compulsory jurisdiction of the Court. This will be discussed in due course in its proper place.²

3

In considering the judicial pronouncements discussed in Division B below, it has not formed part of the present writer's purpose to attempt any assessment of the actual correctness or otherwise of Lauterpacht's decision or conclusion in relation to the facts and issues of the particular case concerned. Not only would such an attempt be somewhat invidious, but it is not in any case necessary, for the chief interest of these pronouncements, so far as the present study goes, lies rather in the enrichment they afford to the whole *corpus* of the principles and general rules of international law, irrespective of whether Lauterpacht was right or wrong in his actual conclusion. If any indication of the writer's views on this latter question occasionally emerges, it will be exceptionally and incidentally.

Equally, save exceptionally, it is not the intention to aim at any critical appraisal of Lauterpacht's general views. Their *value* can be taken for granted, and their evaluation can be left to the passage of time as their influence makes itself felt. The object here is exposition and analysis rather than any critical evaluation as such, except to the extent that exposition and analysis must inevitably involve some element of appraisal.

The writer proposes, furthermore, to follow the method adopted in his former series of articles on the jurisprudence of the International Court, and to consider Lauterpacht's judicial views under the five main heads of pronouncements on matters of general principles and sources of law; pronouncements on particular points of law; pronouncements on points of treaty law and interpretation; pronouncements relating to the United Nations or other international organizations; and pronouncements about the procedure and practice of the International Court or other international tribunals. The first two, grouped under one head however, will be considered in the present article: the last three in next year's, which will also contain a final section summing up the general impression made by all these pronouncements. One topic, however, which might be regarded as figuring properly under the last of the above-mentioned heads, namely the nature of the judicial function itself, will be dealt with at the outset under the first head, since Lauterpacht's views about this matter coloured, and to a large extent governed, his whole judicial thinking and approach to his task as a judge of the Court.

¹ See below, pp. 14 et seq.

² It comes under a head falling within the scope of next year's article.

EXTRACTS (A)

'DEGREE OF SUPERVISION'

(see p. 9 of the Article)

Extracts from the separate Opinion of Sir Hersch Lauterpacht in the *South-West Africa Voting Procedure* case (*I.C.J. Reports*, 1955, pp. 94 et seq.):

P. 94:

"The expression "degree of supervision" has two meanings: it signifies primarily the means of supervision. Thus it is clear that the place assigned to periodic missions or to petitions in the System of Trusteeship exceeds the degree of supervision adopted in the Mandates System and that that means of supervision by the United Nations cannot, without the consent of the Government of the Union of South-West Africa, be applied to the Mandated Territory of South-West Africa. This is a question of means of supervision in their wider sense. The Court, whose Opinion is requested on the question of voting, is not concerned with them. However, the term "degree of supervision" covers also the methods of ensuring compliance with the means thus adopted and, in particular, the method of deciding whether the administering authority has complied with them and what steps it ought to take with that object in view. If the General Assembly were to be enabled to take binding decisions on petitions and reports subject to voting requirements less stringent than those obtaining in the Council of the League of Nations—such decisions including request for further information, expression of regret at or disapproval of the action or inaction of the Administering Authority, and call for the cessation of the action disapproved of—then the innovation thus effected would appear to amount to a degree of supervision exceeding that previously in force. This is so although on occasions such decisions may amount to an approval or support of the action of the Administering State—in which case it might be argued that the less exacting vote implies a relaxation of the degree of supervision. However, the State subject to supervision is primarily concerned with the potential interference with its freedom of action by the supervisory organ. Thus viewed, the less exacting method of voting adds to the stringency and the degree of supervision—just as a change of procedure of voting may add to the extent of the obligations. If I agree to accept the obligation to pay taxes in pursuance of unanimous decisions of a committee, then my obligation is increased if the committee, by changing its procedure, can impose taxation by a majority vote. This seems to be a proposition of common sense.'

pp. 95-96:

"These factors are directly relevant to the question of the "degree of supervision". This is not inconsistent with the fact that the second part of the passage ("and should conform as far as necessary to the procedure followed by the Council of the League of Nations") also, and more directly, refers to voting. Accepted usage includes voting within matters of procedure. It is probable that, while the first part of the passage refers to the major principle of not exceeding the degree of supervision hitherto obtaining, the last quoted passage is directed to the more specific problem of the approximation, as far as possible, of that procedure to that obtaining under the Council of the League of Nations. For these reasons I am reluctant to admit that the ordinary and natural meaning of words excludes the method of voting from the notion of degree of supervision. There is no ordinary and natural meaning of the term "degree of supervision"

in the abstract. Its meaning is not something which appears on the surface; it is relative to the situations and problems with which the Court is concerned. Moreover, it is relative to the legal issues directly connected with the situation. Thus, assuming that the main South African contention on the question of unanimity is correct, it would be reasonable to assume that the expressions used by the Court with regard both to "degree of supervision" and "procedure" were not used with the intention of ignoring the legal position thus established. It may not be profitable to regard the entire issue as non-existing on the ground that the words used have a meaning which is fixed, certain and immutable.'

p. 96:

'It is of importance, in this connection, to bear in mind the relation between the two passages here discussed. In my view, of the two conditions there prescribed, the first, relating to the degree of supervision, is the governing directive of a substantive character; the second, which is qualified by the words "as far as possible", is, in terms, procedural. The question is whether the Opinion of 1950 can be properly interpreted in a way which would subject the substantive rule to considerations of procedural conformity and convenience. The question is whether such considerations can properly be permitted to affect or impair the governing principle laid down by the Court in 1950 according to which, in the absence of agreement on the part of the Union of South Africa, the degree of supervision by the United Nations must not exceed that exercised by the Council of the League of Nations.

'There is room for the view that the Union of South Africa is legally entitled to resist any attempted extension of the scope of its accountability and of the corresponding degree of scrutiny, interference and supervision by the United Nations, even if such extension is of a procedural nature, for instance, by way of a particular system of voting so long as no conclusive proof has been adduced that such extension is unavoidable on account of an imperative necessity of relying on the procedure in force in the General Assembly and unalterable in any circumstances.'

pp. 96-98:

'The System of Trusteeship under the United Nations has not replaced the Mandates System; the latter remains in force so far as South-West Africa is concerned. As repeatedly stated in the Opinion given in 1950 the continued exercise of the Mandate must be subject to supervision surrounded by the same, but not greater, obligations and safeguards as those which existed under the League of Nations. Now the obligations of a country can be decisively influenced by the voting procedure in respect of the decisions which interpret and apply those obligations. When the Opinion of 1950 said, and reiterated, that the obligations of the Mandatory remained unaltered, it did not mean only that South Africa continued to be bound by these obligations and that she must not subtract from them; it meant also that these obligations ought not to be increased. The continuation of the obligation must in all fairness be held to work both ways. This seems to me to be the governing consideration. In relation to it, the interpretation, however necessary, of the terms "degree of supervision" and "as far as possible" seems almost to assume the complexion of a technicality. In relation to it, exclusive reliance on the supposed ordinary and natural meaning of the expression "degree of supervision" as bearing no relation to the voting procedure would seem to me highly questionable.

'As I see it, the words "as far as possible" do not mean that the unqualified injunction against exceeding the degree of supervision under the League of Nations is in fact

qualified by the obligation to follow “as far as possible”—and only as far as possible—the procedure of the Council of the League of Nations and that if such approximation to that procedure is not possible having regard to the voting procedure of the General Assembly of the United Nations as laid down in Article 18 of the Charter, then the degree of supervision must unavoidably be exceeded. The Opinion of the Court rendered in 1950 did not say that the degree of supervision as it existed under the Mandates System must not be exceeded provided that that is possible under the then existing voting procedure of the General Assembly. On the face of it, the words “as far as possible” may be interpreted as meaning that, within the framework of compliance with the overriding prohibition of exceeding the degree of supervision of the League of Nations and if there is a variety of procedures available, that procedure must be followed which corresponds more closely to that of the Council of the League of Nations. For reasons stated elsewhere in this Opinion, I cannot accept the view that the words “as far as possible” contained an implied and imperative reference to an existing and unalterable procedure of the General Assembly and that any such interpretation has the legitimate effect of overriding the basic prohibition of extending the degree of supervision under the League of Nations by dint of the statement that by adopting the rule of two-thirds majority the General Assembly went “as far as possible”, i.e. as far as is legally permissible under the Charter. That statement must be proved by a rigorous and searching examination. Such examination may show, as suggested in another part of this Separate Opinion, that it was legally possible for the General Assembly to go somewhat further than does Rule F in complying with the direction to approximate “as far as possible” to the procedure of the Council of the League.

‘My own conclusions with regard both to construction and the three main questions as formulated above are such that it is not necessary for this Court to adopt an interpretation of the Opinion given in 1950 which in my view would amount to saying that in that Opinion the Court laid down, as the result of an oversight or otherwise, two mutually contradictory directives, and that, by way of an implied reference to an unalterable voting procedure of the General Assembly, it reduced to meagre proportions the essence of its substantive ruling on one of the principal aspects of its Advisory Opinion on the International Status of South-West Africa.’

DIVISION B: LAUTERPACHT’S PARTICULAR JUDICIAL PRONOUNCEMENTS

I. PRONOUNCEMENTS ON GENERAL PRINCIPLES OF LAW, SOURCES OF LAW AND PARTICULAR POINTS OF INTERNATIONAL LAW

§ 1. THE NATURE OF THE JUDICIAL FUNCTION IN THE INTERNATIONAL FIELD

There are broadly two main possible approaches to the task of a judge, whether in the international field or elsewhere. There is the approach which conceives it to be the primary, if not the sole duty of the judge to decide the case in hand, with the minimum of verbiage necessary for this purpose, and to confine himself to that. The other approach conceives it to be the proper function of the judge, while duly deciding the case in hand,

with the necessary supporting reasoning, and while not unduly straying outside the four corners of the case, to utilize those aspects of it which have a wider interest or connotation, in order to make general pronouncements of law and principle that may enrich and develop the law.

If it be asked which of these two attitudes is the better, the answer may well be 'both', or at any rate that each is defensible; but clearly much depends on the circumstances. The sort of bare order or finding that may suit many of the purposes of the magistrate or county court judge will by no means do for the Court of Appeal, the House of Lords or the Judicial Committee of the Privy Council, and their equivalents in other countries. International tribunals at any rate have usually regarded it as an important part of their function, not only to decide, but, in deciding, to expound generally the law having a bearing on the matters decided.

Again, most judges probably have a personal preference or bias in favour of one of these approaches; and even where the nature and exigencies of the case, or the character and standing of the tribunal, call for some analysis and exposition of the relevant law, it is obviously possible to give a more, or a less, extensive effect to this requirement in any given case; and whereas many if not most judges achieve a position of balance between the two possibilities, some have been famous for the ultra laconic and lapidary nature of their utterances, while others have been no less famous, not to say notorious, for going out of their way to hand down what amounted to miniature treatises on the branch of the law involved.

Without proceeding to any such extremes, Lauterpacht was by temperament and training, and because of his long academic experience, a firm adherent of the view that a judge who only decides the case in hand only accomplishes half his real task, the other half of which is to impart judicial backing and authority to as many principles and rules of law as possible and to the way in which these should be applied to particular situations. For this reason, his judgments and opinions constitute a particularly rich mine in which to quarry for general pronouncements of law and principle.

This attitude of Lauterpacht's was by no means one which he developed only in consequence of becoming a judge of the International Court. It had formed a part of his basic approach to the question of the nature of the judicial function in the international field for as long as he had been writing and teaching on international law topics; and it was no accident that caused Dr. Jenks, in the study of Lauterpacht's pre-judicial work referred to in the opening paragraph of the present article, to devote approximately one-sixth of his space to Lauterpacht's classic work *The Function of Law in the International Community*, written when he was only about 35.¹ In this book, as Dr. Jenks shows, Lauterpacht rejected as untenable the supposed

¹ Oxford, the Clarendon Press, 1933; Jenks, loc. cit., pp. 9-27.

distinction between justiciable and non-justiciable disputes between States, and in order to do this he did not rely on the facile argument that every such dispute is, or can be said to be justiciable in the sense that even if it is 'political', or does not apparently resolve rights or interests of a specifically legal character, an international legal tribunal can nevertheless always reach a legal conclusion by finding in favour of the defendant state on the basis that international law being silent on the matter in hand, or there being nothing in international law to prevent the defendant state from acting in the manner complained of, that State is therefore legally entitled so to act, and the complaint must be rejected.

This was because Lauterpacht entirely denied the validity of the notion of *non-liquet*—the idea that an international legal tribunal might, by the apparent absence of applicable legal rules, be reduced to declaring itself unable to give a decision. In taking this line, he was not of course so naïve as to suppose that a dispute is necessarily settled in the wider sense by a finding on the legal aspects of it. His point was that, contrary to a very widely held belief, every dispute between States does have legal aspects which can and should be settled by international adjudication. Lauterpacht believed that an international legal tribunal could always resolve a dispute *positively*, so far as its legal aspects were concerned, and not merely by the negative process of rejecting a claim or complaint on the ground of the supposed absence of legal rules. He believed this could be done by the application of general principles of law, if necessary of private law; by a 'recourse to creative judicial activity, aiming at solving the controversy by shaping a legal rule through the process of judicial reconciliation of conflicting legal claims entitled to protection by law';¹ and finally, in the treaty relations between States, by interpreting the relevant treaty clauses in such a way as to render these—and in consequence the relations dependent on them—effective rather than the reverse.² The essence of his thinking on this matter appears in a passage cited by Dr. Jenks³ which the present writer may, on account of its importance, be forgiven for citing again:

'The history of international [*sc.* legal] arbitration is a continuous proof of the view that the alleged absence of legal rules does not in actual practice constitute an obstacle in the way of judicial settlement of international disputes. For three lessons emerge with convincing clearness from the practice of international arbitration in the last hundred and thirty years; the first is that in the majority of cases international tribunals have been confronted with novel situations for which international law had no ready-made solutions at hand. The second is that there is, so far as the writer is aware, no

¹ See *The Function of Law in the International Community*, p. 111, cited by Jenks, *loc. cit.*, p. 13, and see n. 1 on p. 15, above.

² *Ibid.* Here can be seen an early appearance of one of Lauterpacht's most firmly held tenets—*ut res valeat quam pereat*.

³ Jenks, *loc. cit.*, p. 13; from the *Function of Law*, p. 103.

dispute on record in which an international tribunal has refused to adjudicate on the ground that there was no law applicable to the case. The third is that this consistent fulfilment of the judicial duty to pronounce the law in each case has *not* been achieved at the cost of sacrificing the strictly legal character of international arbitration' [italics added: in short international legal tribunals have never been reduced to acting as mere conciliation commissions].

In the light of these views and of the specific reference to 'the judicial duty to pronounce the law in each case', it is not surprising to find that on the very first occasion on which he sat as a judge,¹ Lauterpacht went out of his way to complement the views above cited by a specific pronouncement on a further matter of the greatest importance in relation to the nature of the judicial function. In the *South-West Africa Voting Procedure* case, Lauterpacht, while agreeing with the substantive conclusions of the Court, considered that in the Opinion given by the Court itself, these were not supported by sufficient reasoning, and in particular that this Opinion failed to deal with some of the most important issues in the case, and was in fact based on considerations of relatively minor importance. Having formulated three questions which appeared to him to constitute the real issues involved, he continued (*I.C.J. Reports*, 1955, p. 91):

'Finally, and this is substantially the method followed by the Court, it is possible to answer the question put to the Court without primary reference to any of these questions but merely on the basis of a construction of the relevant passages of the Opinion of the Court of 1950.'

He went on to say that it was, however, in his view

'... essential, having regard both to the circumstances of the case and to the objects of the judicial function of the Court in general, that its Opinion should contain an answer to the legal issues relevant to the case, especially when relied upon by the Members of the General Assembly including South Africa.'

Referring to South Africa's contention that the voting procedure of the United Nations Assembly, being a majority voting procedure, created more stringent conditions for the mandatory Power than the voting procedure of the former Council of the League, which proceeded by unanimity, including the vote of the mandatory Power itself, he said (*ibid.*):

'... I consider that that argument of South Africa ought to be answered in all requisite detail. It ought not to be disregarded on the ground that it is irrelevant for the reason that it is ruled out by what is described as the ordinary and natural meaning of the words of the Opinion of 1950. For this was the main argument put forward by South Africa in the course of the discussions before the General Assembly and its Committees. It was the question of the justification of that contention which exercised members of the General Assembly, which troubled their consciences, and which was largely responsible for the request for the present Opinion. The circumstances of the

¹ This was the *South-West Africa Voting Procedure* case.⁴ For the reason given in n. 2 on p. 3, above, Lauterpacht did not sit in the *Nottebohm* case (merits) even though it was heard after his election.

case are such that full consideration ought to be given to the principal legal argument of the State which, as a Mandatory has put itself in opposition to the repeatedly expressed judgment of the United Nations and whose conduct has been the object of wide disapproval. For this reason, although I do not accept this particular contention of the Government of South Africa, I must consider it in detail.'

Pointing out that similar considerations were applicable as regards the other issues of substance passed over by the Court, he recognized that the Assembly had only put one question to the Court, and that the Court must, of course, answer that question and only that question; but, he said,

'... in order to reply to that question, the Court is bound in the course of its reasoning to consider and to answer a variety of legal questions. This is of the very essence of its judicial function which makes it possible for it to render Judgments and Opinions *which carry conviction and clarify the law*' [italics added].

In this passage, Lauterpacht proclaimed his belief that it was the duty of a tribunal such as the International Court not only to decide the case in hand, or answer the specific question put to it, but also to deal with all the connected legal issues, and to clarify the law relating to them. On the whole matter he also, by implication, put his finger on what tends to be an inherent weakness of tribunals such as the International Court. Quite apart from the tendency of most courts to avoid dealing with issues the consideration of which may not be strictly necessary in order to reach a conclusion, there exists a natural temptation for a tribunal of fifteen members drawn from as many different countries, from a variety of races, and trained in widely differing legal systems—particularly in cases having political as well as legal implications—to be as non-committal as possible: indeed, there may well be cases in which a majority view can only be formulated on that basis by such a tribunal. It must often be the fact that the real difficulty lies not so much in reaching a conclusion as in giving it expression. This would also be one explanation of the length of time which such a tribunal will usually take to reach, or at any rate to formulate its decisions, as compared with national tribunals whose members have all had the same legal training, background and experience. There is the further advantage that the fewer issues that are dealt with, the less will the tribunal be in some sense committed in advance, if any of them should arise primarily and directly in some future case.

It was part of Lauterpacht's creed as an international judge to combat these tendencies; for he saw very well that if they were particularly strong in the international judicial field, it was also precisely in that field that they ought most strenuously to be resisted. Domestic courts can, if they wish, plead with some plausibility as a ground for not going beyond what is barely necessary for a decision, that a national legislature exists which can, by legislative action, remedy any gaps or obscurities in the law. In the

international field there is at present nothing comparable to a legislature,¹ and the operation of the so-called law-making treaty is both uncertain and leaves many loose ends. The international community is therefore peculiarly dependent on its international tribunals for the development and clarification of the law, and for lending to it an authority more substantial and less precarious than can be drawn from the often divergent or uncertain practices of States, or even from the opinions of individual publicists, whatever their repute.

It is also evident from the foregoing citations from Lauterpacht's Opinion in the *Voting Procedure* case that he was moved by a further consideration. Leaving aside the question of how far it is consonant with the dignity of States, or of the Assemblies of the great international organizations, for the Court to ignore or pass over as irrelevant, issues which have strongly exercised them, it is no less important—it is if anything even more important—in the international than in the domestic field, that justice should not only be done, but be seen to be done; for the repercussions of any failure in this respect are likely to be wider and more serious. A State which has placed a particular issue in the forefront of its case is unlikely to be convinced (and will certainly not be satisfied) by a decision reached on the basis of some other relatively unimportant consideration, even though that should be technically sufficient for the decision. For a major international tribunal habitually to proceed in this manner (and it is not suggested that the International Court has in general done so) would risk bringing the whole idea of international justice into disrepute.

This is what Lauterpacht saw; and in the later case of the *Norwegian Loans* (*France v. Norway*) he was sufficiently consistent to apply it against himself so to speak, and did the same in the *Interhandel* case (jurisdiction)—see note 2 on p. 20. In the *Norwegian Loans* case, he considered that the whole of the jurisdictional issue could be disposed of very simply on the ground that the French acceptance of the compulsory jurisdiction of the Court was null and void, and therefore the Court was wholly without competence. Consequently, in his view, the preliminary objections formulated by Norway on other grounds, such as the French failure to exhaust local legal remedies in Norway, did not arise. Nevertheless, as these matters had been put in issue by Norway as a principal part of her case, he went on to give his opinion about them. After stating as a general proposition (*I.C.J. Reports*, 1957, p. 35) that '... when a Party has advanced objections to the jurisdiction of the Court, the decision on the question of jurisdiction must be reached by reference to objections which, in the intention of the

¹ Up to a point, and within various specialized fields, the Assemblies of some international organizations may exercise a quasi-legislative function, but not in a manner that is really comparable to the action of a national legislature.

party advancing them, are principal rather than subsidiary and which are substantive rather than formal',¹ he continued as follows (*ibid.*, p. 36):

'In my opinion a Party to proceedings before the Court is entitled to expect that its Judgment shall give as accurate a picture as possible of the basic aspects of the legal position of that Party. Moreover I believe that it is in accordance with the true function of the Court to give an answer to the two principal jurisdictional questions which have divided the parties over a long period of years and which are of considerable interest for international law. There may be power and attraction in the view that amongst a number of possible solutions a court of law ought to select that which is most simple, most concise and most expeditious. However, in my opinion such considerations are not, for this Court, the only legitimate factor in the situation.

'Accordingly, although I am of the opinion that there is before the Court no valid Declaration of Acceptance [*sc.* of its compulsory jurisdiction on the part of France] by reference to which it can assume jurisdiction, I consider it to be my duty to state my opinion as to the principal Preliminary Objections of Norway.'²

In this passage, Lauterpacht clearly affirmed his belief that a tribunal such as the International Court has a duty, both to the parties and in the general interests of the law, that may go considerably beyond giving a bare decision, and may go beyond the issues the consideration of which will technically suffice to motivate that decision.

The double theme that the Court must be prepared to go beyond the issues necessary for a bare decision, and that it must tell the parties what they want to know, appears repeatedly, though in various forms and contexts, in Lauterpacht's judgments and opinions. Thus in the *Guardianship of Infants* case (*Netherlands v. Sweden*), he said (*I.C.J. Reports*, 1958, p. 89) that although the Court was not 'rigidly bound to give judgment by exclusive reference to the legal propositions as formulated by the parties in their conclusions', he nevertheless considered

'... that I ought not to disregard the conclusions of the Parties formulating exhaustively the legal issue between them and asking the Court to pronounce upon it as part of its operative decision. It is only when it is abundantly clear that the formulation, adopted by the parties, of the legal issue cannot provide a basis for the decision and that there is another legal solution at hand of unimpeachable cogency, that I would feel myself free to disregard the conclusions of the Parties. Neither of these conditions seems to me to obtain in the present case ... the legal issue as ... expressed by the

¹ Norway had advanced an objection based on France's 'automatic' reservation of matters of domestic jurisdiction as determined by herself; but she had indicated that this objection was of minor and residual importance, subsidiary to her main objections such as the one based on the local remedies rule.

² Similarly in the *Interhandel* case (jurisdiction), Lauterpacht, while holding the same view as to the nature and effect of the United States' 'automatic' reservation of domestic jurisdiction—which for him disposed of the whole jurisdictional issue in a manner that made it unnecessary to consider any other preliminary objection—nevertheless said (*I.C.J. Reports*, 1959, p. 119) that as the Court had decided 'to proceed on the basis that the Declaration of Acceptance of the United States is a valid legal instrument cognisable by the Court', he considered it his 'duty to participate in the formation of the Court's judgment' on the other preliminary objections advanced by the United States.

Parties in their pleadings and Conclusions in the present case touches directly upon a difficult and controversial question which has constituted one of the crucial problems in the sphere of private international law and which brings into prominence the relation between private and public international law.'

Lauterpacht then went on to base his Judgment mainly on the plea of *ordre public* as justifying Sweden's action in the case, which both parties had treated as the principal issue involved; whereas the Court, which arrived at the same operative conclusion as Lauterpacht, refused in terms to base itself on any consideration of *ordre public*, stating that it did not 'consider it necessary to pronounce on this contention'. Accordingly, it based its decision on the view that, upon the strict construction of the Swedish-Netherlands Convention of 1902, a breach of which was alleged by the Netherlands, Sweden was entitled to act as she did, and there was consequently no occasion to bring in the concept of *ordre public*. It should be mentioned that Lauterpacht did not agree with the Court about the effect of the 1902 Convention; and he considered that *unless* Sweden's action could be regarded as coming under the head of *ordre public*, and unless an *exceptio ordinis publici* could be regarded as constituting an implied term of the Convention, Sweden must be regarded as having violated the Convention. For him therefore, the issue of *ordre public* was not merely *one* of the relevant issues in the case, but an essential issue. However, it is clear from his attitude in the *Norwegian Loans* case, discussed above, that he would in any event have felt obliged to pronounce on the question of *ordre public*.

In another part of his Opinion in the same case, Lauterpacht (who was always a great disbeliever in unreal or merely technical distinctions) said (*ibid.*, p. 86) that the rights of the parties, 'especially in an international dispute', ought not to be determined by reference to the 'controversial mysteries of the distinction between private and public law'.

The same attitude can be discerned, though in another context, in the *South-West Africa Oral Petitions* case, where Lauterpacht insisted that although a question had been addressed to the Court in quasi-abstract terms by the Assembly of the United Nations, and without specific reference to particular circumstances, the Court must, *proprio motu*, take account of those circumstances, and indeed would not be able to give the Assembly the advice requested unless it did so; for the nature of the answer depended on these circumstances. As it had never been the practice of the former League Council to hear oral petitioners from mandated territories, it would not be proper for the United Nations to do so,¹ provided the mandatory Power was complying with the terms of the mandate, and was

¹ Because this would not be following League practice 'so far as possible'—see the discussion on p. 8 above.

furnishing information through the normal and regular channels. If, however, this was *not* the case, then the United Nations might well be justified in seeking information by other means. Here again there was, for Lauterpacht, what constituted an essential issue; for while agreeing with the operative conclusion of the Court, he did not agree with its basis—namely, that although the former League Council had never in fact heard oral petitions, it could have done so had it wanted to, and therefore the United Nations could do so too. But it is in any case clear that Lauterpacht would never have ignored the question of the bearing that South Africa's attitude might have on the matter, for he consistently refused to consider questions in the abstract, divorced from the underlying circumstances, and he always set great store by the behaviour of the parties as a criterion for arriving at a just and realistic conclusion.

In taking up this attitude, Lauterpacht was at pains to distinguish the *Petitions* case from the situation that had obtained in the first *Admission to Membership of the United Nations* case, in which the Court had expressly found (*I.C.J. Reports*, 1947–8, p. 61) that it was its duty 'to envisage the question in the abstract form which has been given to it', and that 'nothing which is said in the present opinion refers, either directly or indirectly, to concrete cases or particular circumstances'. Clearly the fact that an opinion does not specifically refer to such cases or circumstances does not mean that they were not taken into account in arriving at the opinion, or were rigidly excluded from all consideration by the Court. As Lauterpacht pointed out, the contention with which the Court had been faced in the *Admissions* case was that by answering the question put to it, the Court would be dealing with what (so it has been suggested) constituted an essentially, or primarily, political issue. The real meaning of the Court's reference to the abstract form of the question was that, in the Court's view, the very fact that it had been possible to frame the question in these terms, and not with reference to any concrete situation or specific case, demonstrated its essentially legal nature, and entitled and even obliged the Court to give a similar form to its reply. This was clearly quite a different thing from ignoring the circumstances in arriving at the Opinion.

To conclude this section, reference may be made to a further point that arose in the *Oral Petitions* case, in reference to which Lauterpacht made clear his view that a court asked to pronounce on a legal issue cannot properly refuse to do so on the ground that in its view the matter would be better dealt with by some political body. Pointing out that the issue in the case was not whether the United Nations Assembly could, by one means or another, invest itself with the legal right to hear oral petitions from South-West Africa, but whether or not it already had that right, he said (*I.C.J. Reports*, 1956, p. 450) that the Court could not

'... avoid its judicial duty by declaring that only a political or legislative body is competent to resolve the conflict which has arisen, as the result of the action of a party, between the overriding purpose of the instrument and its individual provisions and limitations. To resolve that conflict, in the light of the instrument as a whole, is an essential function of a judicial tribunal.'

This was followed up in a later passage (*ibid.*, p. 57) by a statement to the effect that

'... the Court could not, in the present case, renounce its legitimate function on the ground that the appropriate result can be achieved by the legislative action of the appropriate political organ. Reluctance to encroach on the province of the legislature is a proper manifestation of judicial caution. If exaggerated, it may amount to unwillingness to fulfil a task which is within the orbit of the functions of the Court as defined by its statute. The Court cannot properly be concerned with any political effects of its decisions.'

§ 2. THE SUPREMACY OF INTERNATIONAL OVER NATIONAL LAW IN THE INTERNATIONAL FIELD

Lauterpacht's judicial views on this matter have already been considered in this *Year Book* for 1959 (pp. 186 et seq.) in the last of the unfinished series of articles which the present writer formerly contributed on the jurisprudence of the International Court.¹ It was there suggested that much sterile controversy could be avoided if it were clearly realized that the principle does not mean that international law always or necessarily *will* automatically override national law in the domestic field (indeed it very seldom will); but means rather that, in any case where a breach of an international obligation results from its not having done so, no absolution from the breach or its consequences will be afforded by the fact (if such be the case) that the act or omission complained of was sanctioned by the national law. Lauterpacht's views on the interrelationship of the two, as stated by him in the *Norwegian Loans* case, were set out *in extenso* in the writer's 1959 article and the following passage may be reproduced again here (*I.C.J. Reports*, 1957, pp. 37-88):

'It may be admitted, in order to simplify a problem which is not at all simple, that an "international" contract must be subject to some national law; this was the view of the Permanent Court of International Justice in the case of the *Serbian and Brazilian Loans*. However, this does not mean that that national law is a matter which is wholly outside the orbit of international law. National legislation—including currency legislation—may be contrary, in its intention or effects, to the international obligations of the State. The question of conformity of national legislation with international law is a matter of international law. The notion that if a matter is governed by national law

¹ 'Unfinished', because the writer's election to the Court in 1960 rendered it for obvious reasons difficult for him to go on with them. It is, however, hoped that Sir Humphrey Waldock will be able in due course to continue the series, though not necessarily in quite the same form.

it is for that reason at the same time outside the sphere of international law is both novel and, if accepted, subversive of international law. It is not enough for a State to bring a matter under the protective umbrella of its legislation, possibly of a predatory character, in order to shelter it effectively from any control by international law. There may be little difference between a Government breaking unlawfully a contract with an alien and a Government causing legislation to be enacted which makes it impossible for it to comply with the contract.'

Again, in the *Guardianship of Infants* case, Lauterpacht gave a most important application of this principle, in the type of situation where there has not been a direct and specific breach of the international obligation (in this case a treaty obligation) in the actual field to which the obligation relates; but where the State concerned, by action in another field, has created a situation in which the obligation cannot be, or is not in fact being carried out. The facts were fairly fully set out on pp. 192-4 of the writer's article just referred to, and need not be set out again here, except to state what the issue was. By a Convention relating to the guardianship of infants, Sweden and the Netherlands were mutually bound—in relation to infant nationals of the one country resident in the other—to recognize and give effect to the guardianship arrangements made by the competent authorities of the State of nationality. The question was whether the Swedish authorities, by taking action under a Swedish law relating to child welfare and protective upbringing (which in fact deprived the guardian appointed by the Dutch courts of the physical custody of the infant, but not of the status, or other attributes of guardianship), had, in effect, infringed the Convention. The contention of the Swedish Government was that the Swedish law in question dealt with a different subject from that covered by the Convention (if at points related to it). Consequently, the two could not conflict, and action taken under the one could not be a breach of the other. The Court acceded to this view, saying (*I.C.J. Reports*, 1958, p. 71) that 'The 1902 Convention cannot . . . have given rise to obligations binding upon the signatory States in a field outside the matter with which it was concerned, and accordingly the Court does not in the present case find any failure to observe that Convention on the part of Sweden.'

Lauterpacht, though also finding in favour of Sweden, did so on other grounds, and disagreed *in toto* with the Court's view on this particular point. He considered that the words in the Court's finding, 'in a field outside the matter with which it [the Convention] was concerned', begged the whole question at issue—for the Court seemed to take this as self-evident, and made little attempt to demonstrate it. He rejected the suggestion that, because the Dutch guardian had not been technically displaced, but was merely not allowed to have the physical custody of the infant, there was no impairment of guardianship: 'so long as the exercise of the right of custody

is vested in the hands of the Swedish authority and of the Swedish maternal grandmother acting on its behalf, there is a nullification of the essential attributes of guardianship as instituted by the Convention' (ibid., p. 83). As has already been seen (above, p. 21), he rejected the view that any sound distinction could be based on the fact that guardianship lay in the sphere of private law rights and duties, whereas the action of the Swedish authorities was based on provisions of public law; and he denied also that guardianship on the one hand, and child welfare on the other, could be regarded as appertaining exclusively either to private law alone, or to public law alone. Finally, he rejected the whole principle that if an international obligation was not in fact carried out, there was, nevertheless, no breach of it if the action complained of purported to be taken in another field, or to lie on another plane, than that to which the obligation related. His pronouncements on this last point are so important as to warrant citation *in extenso* (ibid., pp. 80-82):

"The reasoning underlying these contentions raises important questions, transcending the issue immediately before the Court, of interpretation and observance of treaties. If a State enacts and applies legislation which, in effect, renders the treaty wholly or partly inoperative, can such legislation be deemed not to constitute a violation of the treaty for the reason that the legislation in question covers a subject-matter different from that covered by the treaty, that it is concerned with a different institution, and that it pursues a different purpose? I have considerable difficulty in answering that question in the affirmative. The difficulty is increased by the fact that the conflict between the treaty and the legislation in question may be concealed, or made to be concealed, by what is no more than a doctrinal or legislative difference of classification. An identical provision which in the law of one country forms part of a law for the protection of children may, in another State, be included within the provisions relating to guardianship. That, as will be shown, is no mere theoretical possibility. It is in fact a conspicuous feature of the present case.

"What is the meaning of the expression: "The Convention of 1902 does not cover a system such as that set up in the Swedish Law on Protective Upbringing?" It is admitted that guardianship under the Convention covers the right to decide on the residence and education of the minor—a right claimed and exercised by a Swedish authority and, on its behalf, by the Swedish maternal grandfather acting in pursuance of the Law on Protective Upbringing. If that is so, then the Convention does cover, in one of its essential aspects, the same powers and functions which are now exercised by Swedish authorities in pursuance of the Law on Protective Upbringing. The substance is the same although the purpose of the Convention and of the Law may be different. It may be said that what matters is not the substance of these functions but their object. It is not easy to follow that distinction. When a State concludes a treaty it is entitled to expect that that treaty will not be mutilated or destroyed by legislative or other measures which pursue a different object but which, in effect, render impossible the operation of the treaty or of part thereof.

"The treaty covers every law and every provision of a law which impairs, which interferes with, the operation of the treaty. It has been said that the Law in question may have an adverse effect upon subject-matter of the treaty without being covered by

the treaty. However, what the Court must be concerned with is exactly the effect of the Law inasmuch as it impairs the operation of the treaty, and not the notional identity or otherwise of the objects pursued by the Law and the treaty. The treaty prohibits interference with its operation unless there is a justification for it, express or implied, in the treaty; that justification cannot be found in the mere fact that the Law pursues an object different from the object pursued by the treaty. It can be found only in the fact that that particular object is expressly permitted by the treaty or implicitly authorized by it by virtue of some principle of public or private international law—a principle such as stems from public policy or from a cognate, although more limited, principle, which is often no more than another formulation of public policy, namely, that certain categories of laws, such as criminal laws, police laws, fiscal laws, administrative laws, and so on, are binding upon all the inhabitants of the territory notwithstanding any general applicability of foreign law.

‘The following example will illustrate the problem and the consequences involved: States often conclude treaties of commerce and establishment providing for a measure of protection from restrictions with regard to importation or export of goods, admission and residence of aliens, their right to inherit property, functions of consuls and the like. What is the position of a State which has concluded a treaty of that type and then finds that the other Party whittles down, or renders inoperative, one after another, the provisions of that treaty by enacting laws “having a different subject-matter” such as reducing unemployment, social welfare, promotion of native craft and industry, protection of public morals in relation to admission of aliens, racial segregation, reform of civil procedure involving the abolition of customary rights of consular representation, reform of the civil code involving a change of inheritance laws in a way affecting the right of inheritance by aliens, a general law codifying the law relating to the jurisdiction of courts and involving the abolition of immunities, granted by the treaty, of public vessels engaged in commerce, or any other laws “pursuing different objects”? It makes little or no difference to the other Party that the treaty has become a dead letter as the result of laws which have so obviously affected its substance, but which pursue a different object. As stated, some of these laws may be justified as being within the domain of public policy or for some cognate reason. However, the argument here summarized does not proceed on these lines. It is based on the allegation of a difference between the treaty and the Law which impedes its operation.’

He concluded accordingly (*ibid.*, p. 83) that

‘A State is not entitled to cut down its treaty obligations in relation to one institution by enacting in the sphere of another institution provisions whose effect is such as to frustrate the operation of a crucial aspect of the treaty. There is a disadvantage in accepting a principle of interpretation, coined for the purposes of a particular case, which, if acted upon generally, is bound to have serious repercussions on the authority of treaties. As stated, the Convention and the particular provision of the Law on Protective Upbringing cover, in relation to the present dispute, the same ground and the same subject-matter. It has been said that there is a technical difference, inasmuch as they lie on different planes, between the Convention and the Law on Protective Upbringing. Assuming that there is a technical difference, it may still be considered undesirable that a dispute between two Governments shall be decided by reference to a controversial technicality in a case relating to significant issues of substance—a technicality which, if acted upon generally, would introduce confusion, or worse, in the law of the operation of treaties. Once we begin to base the interpretation of treaties on

conceptual distinctions between actually conflicting legal rules lying on different planes and for that reason not being, somehow, inconsistent, it may be difficult to set a limit to the effects of these operations in the sphere of logic and classification.'

These are amongst the most important pronouncements of a judicial character ever made in the international sphere, and it is to be hoped that they will have a corresponding influence. This is a matter that might have been discussed later in the second of these articles, under the head of treaty law; but it is of much wider import, for, although it arose in a treaty context, the principle involved is equally applicable whenever an alleged breach of an international obligation is stated not to have occurred because the acts or omissions complained of have taken place on a plane to which the obligation does not relate.

Lauterpacht, of course, recognized that there must be certain limits to the view he upheld in the *Guardianship of Infants* case, and on pp. 86-87 of the *Report* he said:

'Clearly the guardian does not enjoy immunity from the operation of local law, such as criminal law, which may deprive him of the custody of a minor placed in a penal or reformatory institution. The guardian is subject to laws relating to education, health, revenue and so on. However, although, in the absence of a more substantial justification than [*sc. mere*] differences of classification, the guardian enjoys no immunity from local law, he is entitled in principle to immunity from being deprived permanently or semi-permanently of some of the main attributes of guardianship such as custody of the child—especially if such custody is made the subject of what, in the circumstances of the case, is apt to give the impression of a rival guardianship.'

It might not perhaps be altogether easy in particular cases to decide on which side of the line the matter fell; but the basis of the distinction that Lauterpacht was seeking to draw would seem to have been whether the law concerned merely treated—under another name or with a different label affixed—of what was essentially the same matter as was covered by the Treaty, and doing it in a manner that produced an infraction of the Treaty; or whether it dealt with an inherently different matter, of a public character, which must be given a general application and effect. Lauterpacht did not believe that, for the purpose of implementing the Swedish-Netherlands Convention of 1902, any valid distinction could be drawn between guardianship laws on the one hand, and laws on child welfare and protective upbringing on the other; and he said (*ibid.*, p. 85):

'It is a matter of legislative technique and drafting whether the provisions for the protection of children in relation to whom normal guardianship has proved insufficient are, as in Holland, made part of the legislation relating to guardianship, or whether, as is the case in Sweden, they are embodied in a separate enactment [*sc. on protective upbringing*].'

§ 3. *PACTA SUNT SERVANDA*

Although Lauterpacht did not make any specific judicial pronouncement on this principle, which some consider to be the axiom or postulate of natural law forming the whole basis of obligation in international law,¹ all of the first part of his Opinion in the *Guardianship of Infants* case, various passages from which have been cited in the preceding section, was in effect a powerful affirmation of that principle, and indeed a rigorous application of it. It is only necessary to recall the sentence figuring on p. 83 of the *Report* in which Lauterpacht said that

‘A State is not entitled to cut down its treaty obligations in relation to one institution by enacting in the sphere of another institution provisions whose effect is such as to frustrate the operation of a crucial aspect of the Treaty.’

§ 4. DOMESTIC JURISDICTION

(1) *Substantive aspects*

(a) *What matters are matters of domestic jurisdiction?* In the *Norwegian Loans* and *Interhandel* cases, Lauterpacht made a number of observations on what were or might be matters of domestic jurisdiction, and on what were matters governed by international law. Taken all together, the passages containing these observations might give rise to some confusion, for in some of them he seemed to be concerned to give the notion of domestic jurisdiction the utmost possible extension, but in others to cut it down as much as possible, pointing out that many matters which used to be exclusively or essentially of domestic jurisdiction no longer are so because they have come to be regulated by international treaties, or rules of customary international law. The explanation of this apparent paradox is that in the first set of pronouncements, Lauterpacht’s real object was not to indicate what were matters of domestic jurisdiction, but how many matters could plausibly be claimed so to be by a State wishing to invoke a reservation to the Court’s compulsory jurisdiction of the so-called ‘automatic’ type, relating to matters determined by that State to be of its domestic jurisdiction. This question will be fully considered in next year’s article.²

Lauterpacht’s real view on the substance of the domestic jurisdiction question was that very little now remained which, from the standpoint of international law, was solely of domestic jurisdiction. It did not matter whether the term ‘solely’, ‘exclusively’ or ‘essentially’ was used. If any matter—however domestic by origin or nature so to speak—had become, or became, regulated by international law or treaty, it ceased—to that extent at

¹ See the present writer’s 1959 *Year Book* article, pp. 195–6.

² See above, p. 11.

least—to be of domestic jurisdiction only. These views are reflected in the following passage from Lauterpacht's Opinion in the *Norwegian Loans* case (*I.C.J. Reports*, 1957, pp. 51–52):

‘... in the first instance it will be noted that the French reservation in issue refers not to matters which are according to international law exclusively within the domestic jurisdiction of the State, but to matters which are essentially within the domestic jurisdiction. There are matters which have often been considered as being essentially within the domestic jurisdiction of States but which, having become regulated by treaty or custom, have ceased to be so—an aspect of the question for which the Advisory Opinion of the Permanent Court of International Justice in the case of *Tunis and Morocco Nationality Decrees*¹ provides an instructive and authoritative illustration. Tariffs, immigration, treatment of aliens and citizens in national territory, internal legislation generally—all those matters have been claimed to be essentially within the domestic jurisdiction of the State—though, as stated, they have often been described as being matters of domestic jurisdiction or essentially of domestic jurisdiction. Practically every aspect of the conduct of the State may be, *prima facie*, within that category for the reason that normally the State exercises its activity within its national territory, or, on the high seas, in relation to its ships which for some purposes are considered by States to form part of its territory. In the *Lotus* case² the Court was prepared to base its decision, to some extent, on the view that the ship affected was Turkish territory and that the offence was therefore committed in Turkey. . . . Most Judgments given by this Court and its predecessor—with the exception of those concerned with territorial disputes—have been given in relation to matters bearing on the activity of the State within its jurisdiction and related to its national legislation and administration. These are the typical occasions giving rise to State responsibility.’

Earlier in the *Loans* case (*ibid.*, p. 37) Lauterpacht said that he was ‘unable to accept the view that the present dispute is not related to international law but exclusively to the national law of Norway’. Recognizing that the question of the interpretation of contracts between the Norwegian State and the French bondholders was ‘primarily a question of Norwegian law’, and that Norwegian law was ‘the proper law of the contract’, he did not think that this made the matter one exclusively or essentially of Norwegian domestic jurisdiction alone, for

‘... the complaint of the French Government is that, having regard to the currency legislation suspending the operation of the gold clause, the Norwegian law which the Norwegian Courts are bound to apply in this case is contrary to international law . . . it is that very legislation, in so far as it affects French bondholders, which may be the cause of violation of international law of which France complains’,

and again (*ibid.*):

‘... it is difficult to accept the argument of Norway to the effect that as this Court can decide only on the basis of international law and that as the main substantive question in the dispute is the interpretation of Norwegian law, this is not a dispute which is covered by Article 36 (2) of the Statute.³ The dispute now before the Court, although

¹ *P.C.I.J. Reports*, Series B, No. 4, p. 1.

² *Ibid.*, Series A, No. 10, p. 1.

³ And hence not covered by the parties' respective Declarations accepting the compulsory jurisdiction of the Court.

connected with the application of Norwegian Law is also a dispute involving international law. It is possible that if the Court had jurisdiction on the merits [which neither the Court nor Lauterpacht thought it had] it would find that Norway had not violated any rule of international law by declining to repay the bonds in gold. However, in finding that, the Court would apply international law.'

These passages, coupled with those already cited in § 2 above, contain a particularly neat statement of the nature of the interrelationship between international and domestic law, and of how a given matter may well appertain to both; but, in that case, of how (in inter-state relations) it is the international law aspect that governs and predominates. Lauterpacht continued (p. 38):

'The greater part of the written and oral argument of Norway—as well as that of the applicant state—has been devoted to a consideration of the relevant questions of international law. The question of the treatment by a State of the property rights of aliens—including property rights arising out of international loans—is a question of international law. So is the question whether, in this respect, equality of treatment of nationals and aliens relieves a state of its international responsibility. So is, further, the question whether there is in this respect a difference between resident aliens and aliens resident abroad. It may also be difficult to deny that the allegation of discriminatory treatment as between French and non-Norwegian bondholders raises an issue of international law. The very question of whether local remedies have been exhausted—a question on which Norway has made dependent the international character of the dispute—is a question of international law.'

In this piece of masterly understatement—dealing with Norway's contention that the dispute related to matters exclusively within her national jurisdiction—Lauterpacht exhibited to the full his unique power of replying to an argument he thought wrong so crushingly that no rejoinder could well be possible.¹

(b) *What is 'intervention'?* Before he became a judge of the International Court, Lauterpacht's view had tended to be that 'intervention' meant, and meant only, *dictatorial* intervention, whether or not accompanied by the use or threat of armed force. According to this view therefore, simple discussion of any matter (however clearly of domestic jurisdiction it might be) in such a body as the United Nations General Assembly, or even the adoption by the latter of a resolution on the subject (Assembly Resolutions being recommendatory and without actual binding force) did not amount to 'intervention'. It seems unlikely that Lauterpacht continued to hold this view, for a passage from his Opinion in the *Voting Procedure* case indicates that he had come to recognize the powerful effect of Assembly resolutions, despite—or indeed perhaps because of—their no more than moral force; and what he said (*I.C.J. Reports*, 1955, pp. 120–1) in relation to the super-

¹ Though the gentlest and kindest of men personally, this power of utter devastation was a prominent feature of Lauterpacht's work, and other examples of it are given herein.

vision by the Assembly of the functioning of a Mandate is precisely applicable, *mutatis mutandis*, to the intervention question:

'Moreover . . . even if the view is adopted that the effect of a decision of the General Assembly is no greater than its moral force, a decision thus conceived still constitutes a measure of supervision. A system of supervision devoid of legal obligation and legal sanction, can nevertheless provide a powerful degree of supervision because of the moral force inherent in its findings. . . . The phrase "degree of supervision" used in the Advisory Opinion [*sc.* of the Court] of 1950 does not refer necessarily or exclusively to supervision exercised by means of legally binding or enforceable pronouncements. Moral reprobation following upon non-compliance with a valid recommendation adopted in conformity with the Charter may provide a means of supervision as potent or more potent than a legal Sanction.'

Few who have been present at debates in the United Nations Assembly, and who have followed their subsequent outcome and effects, will deny the truth of this statement, or its exact applicability to the type of case in which discussions are initiated in the Assembly, in regard to matters which are, or are claimed to be primarily of domestic jurisdiction. Such discussions are certainly interventionist in *intention*, and, judging by the concrete results produced, interventionist in effect also; for it is probable that not in recorded history have the mere discussions and recommendatory or hortatory resolutions of any assemblage produced such a profound impact on world affairs, or so changed the political face of the globe.

(2) *Jurisdictional aspects*¹

Lauterpacht also made some important pronouncements on the jurisdictional aspects of the domestic jurisdiction question. This apparently tautological expression is, of course, due to the fact that there is, on the one hand, the substantive question of what matters are matters exclusively of domestic jurisdiction, and, on the other, there is the jurisdictional issue of in what circumstances, and with what effect, that question can be raised. For a full discussion of the whole matter, reference may be made to Sir Humphrey Waldock's article 'The Plea of Domestic Jurisdiction before International Legal Tribunals' in this *Year Book* for 1954, pp. 96 et seq.), and for a discussion of the matter in the light of recent pronouncements by the International Court, see the present writer's article in this *Year Book* for 1959, pp. 197-207.

(a) *The 'provisional theory'*. In the *Tunis and Morocco Nationality Decrees* case,² the former Permanent Court solved a problem which had much troubled international jurists. The problem arose in the following way. A plea of domestic jurisdiction can always be raised as part of the

¹ Considered here rather than later, because of the close connexion with the substantive aspects.

² See n. 1 on p. 29, above.

argument on the merits of a dispute (see further below, p. 33), and even if in that event it is treated as a sort of preliminary objection, it will be an objection relating to the merits of the dispute, and not to the competence of the tribunal to go into and determine the merits. But a plea of domestic jurisdiction can also be put forward as an objection to the *competence* of the Court to go into the merits at all. This can strictly be done in those cases, but only in those cases, where a specific documentary right to do so exists, as for instance under a reservation attached to an acceptance of the compulsory jurisdiction of the International Court. Yet the question whether the subject matter of the dispute is one of domestic or of international jurisdiction is normally so closely connected with the merits, that the natural instinct of any international tribunal is to treat the plea as part of the merits and, if it is in the form of a preliminary objection of competence, to join it to the merits. On the other hand, if this course is adopted, then tribunals will find themselves habitually doing the very thing the preliminary objection is intended (*inter alia*) to avoid—namely, embarking on a discussion of the merits, thus depriving such preliminary objections of a large part of their point.¹ *Per contra*, if the tribunal does *not* do this, it may take a course as unfair to the plaintiff State as the other course might prove to be to the defendant State—for it may be that only by an examination of the merits can it be established (if such be the case) that the issue is an international and not merely a domestic one. In this situation, the Permanent Court in the *Nationality Decrees* case,² took a course which, if it did not eliminate all possibility of unfairness, was probably the best possible, whereby the Court did not go into the merits, or join the preliminary objection to the merits, but examined the matter in order to see whether or not it appeared *prima facie* to raise issues of international law or treaty. If definitely *not*, then the plea would be admitted; but if questions of international law or treaty did appear *prima facie* to be involved, it would be rejected.³ This has come to be known as the 'provisional' criterion.

The present Court has not invariably applied the provisional criterion. It did not do so in the jurisdictional phase of the *Indian Land Passage* case (jurisdiction), where it joined the preliminary plea of domestic jurisdiction to the merits on the ground that the plea could only be determined in the light of material and information that would not become available except in connexion with the merits. In the *Interhandel* case (jurisdiction), however, the Court did expressly apply this criterion, and was followed by

¹ Though not, of course, of all point, since a finding of non-competence would entail that the merits, though examined in the course of reaching that finding, would not be substantively pronounced upon.

² See n. 1 on p. 29, above.

³ Though, of course, only as an objection to the jurisdiction of the Court. It could still be pleaded on the merits.

Lauterpacht in doing so. The Court said (*I.C.J. Reports*, 1959, p. 24) that it would

‘. . . base itself on the course followed by the Permanent Court of International Justice in its Advisory Opinion concerning *Nationality Decrees issued in Tunis and Morocco* (Series B, No. 4), when dealing with a similar divergence of view. Accordingly the Court does not, at the present stage of the proceedings, intend to assess the validity of the grounds invoked by the Swiss Government or to give an opinion on their interpretation, since that would be to enter upon the merits of the dispute. The Court will confine itself to considering whether the grounds invoked by the Swiss Government are such as to justify the provisional conclusion that they may be of relevance in this case and if so, whether questions relating to the validity and interpretation of those grounds are questions of international law.’

Adopting the same view, Lauterpacht said (*ibid.*, p. 121):

‘The Court has rejected Preliminary Objection 4 (*b*) by reference to the principle enunciated by the Permanent Court of International Justice in the Advisory Opinion on *Nationality Decrees in Tunis and Morocco* (*P.C.I.J.*, Series B, No. 4). I concur in that result although it is clear that the test adopted by reference to that Opinion reduced to the bare minimum the practical effect envisaged by the reservation in question. For it is not often that a case may arise in which the grounds of international law relied upon by the applicant State are not, upon provisional examination relevant to the issue.’

Here Lauterpacht led up to a point he was to make a little later; and in the passage just cited, he indicated his belief that on the basis of the provisional criterion, the chances of success for a preliminary objection to the *competence* of the Court, founded on a plea of domestic jurisdiction, were slight—since it was unlikely that a preliminary examination would not reveal the existence of some possibly applicable considerations of international law.

(*b*) *Inherent reservation of domestic jurisdiction and right to raise it as a defence.* Lauterpacht went on to make three further points of importance. The United States, the defendant in the *Interhandel* case, while it had attached to its acceptance of the Court’s compulsory jurisdiction a reservation on matters of domestic jurisdiction as determined by itself, had not attached any reservation of matters which, *according to international law*, were matters of domestic jurisdiction. Nevertheless, while making a determination of domestic jurisdiction in regard to certain matters involved by the case, it had made no similar determination in regard to others; but yet had entered a preliminary objection of competence relative to them, on the ground that, irrespective of any specific determination to that effect by the United States Government, these matters were in fact, by international law, matters of domestic jurisdiction. The Court, despite the normal rule that pleas as to *competence* based on domestic jurisdiction can not be entertained unless a documentary right to make such a plea exists or has been validly reserved (and the United States had not so reserved in so far as domestic jurisdiction according to international law was concerned),

entertained the plea (i.e. did not bar it *in limine*), though it rejected it as to its substance. Lauterpacht agreed with that course, and made four points, namely:

- (i) Such a plea can normally only be put forward if a right to do so pre-exists or has been reserved.
- (ii) Such a reservation is, however, to be implied in every Declaration of acceptance of the Court's compulsory jurisdiction, even if not expressly formulated.
- (iii) It should, however, in such event more properly be treated as a defence on the merits, and should be joined to the merits if the Court has in other respects jurisdiction.
- (iv) Even without a reservation, the question of domestic jurisdiction can always be raised as a *defence* on the merits; and, irrespective of any reservation, parties are fully protected by this fact, and by the fact that the Court is in any case bound to reject any claim that really pertains exclusively to matters of domestic jurisdiction, and is not regulated by any rule of international law deriving from one of the sources mentioned in Article 38 of the Court's Statute.¹

These points emerge from the following passages from pp. 121–2 of Lauterpacht's Opinion in the *Interhandel* case (jurisdiction):

'Now a State is not entitled to advance a preliminary objection against the jurisdiction of the Court unless there is a limitation to that effect either in the Declaration of Acceptance or in the Statute of the Court.² The Court, in examining and rejecting that objection on its merits, has held, by implication, that a reservation of that kind is inherent in every Declaration of Acceptance and that there is no need to spell it out expressly. I am in agreement with that conclusion so indirectly formulated. As stated, and that view is confirmed by the rejection by the Court of that objection in conformity with the generous and elastic test laid down in the Opinion on the *Tunis and Morocco Nationality Decrees*, the advantage accruing to the defendant State by a recognition of an implied existence of that reservation is distinctly limited. From whatever angle the question is approached, it matters little whether a reservation of this kind is incorporated in a Declaration of Acceptance. States are in any case fully protected from any interference whatsoever by the Court in matters which are according to international law essentially within their jurisdiction. They are so protected not by virtue of any reservation but in consequence of the fact that if a matter is exclusively within the domestic jurisdiction of a State, not circumscribed by any obligation stemming from a source of international law as formulated in Article 38 of its Statute, the Court must inevitably reject the claim as being without foundation in international law.

'As the United States has made no reservation of matters which according to international law are within its domestic jurisdiction, Preliminary Objection 4 (*b*) must

¹ i.e. treaties, customary international law, the general principles of law, judicial decisions and the works of qualified jurists.

² As stated, this is perhaps not quite wide enough, since jurisdiction can be conferred on the Court in other ways and by other instruments: but the principle remains—that some specific documentary reservation or right of reservation must normally exist.

properly be regarded as a defence on the merits and normally—namely, if there existed a valid Declaration of Acceptance—would have to be examined, during the proceedings on the merits, as being a substantive plea in the sense that there is no rule of international law limiting the freedom of action of the United States on the subject. That defence, if justified, is of a potency transcending that of any reservation. In view of the difficulties and uncertainties to which the reservation of matters of domestic jurisdiction has given rise in the past, I consider it useful to draw attention to some considerations relevant to the fact that the Court has treated the non-existing reservation of matters which according to international law are within domestic jurisdiction as if it were part of the American Declaration of Acceptance.’

§ 5. THE PRINCIPLE OF GOOD FAITH AND THE CRITERION OF REASONABLENESS

(1) *Good faith*

(a) *In general.* Lauterpacht was a firm believer in the principle of good faith as setting up, not merely a moral but a legal obligation for States in the international field; and he would almost certainly have agreed with the present writer in the view expressed in this *Year Book* for 1959, pp. 211–12¹ (which only came out after Lauterpacht’s death) that the very inadequacies and incompleteness of international jurisdiction, and of the possibilities of enforcement, create for States an obligation to act *uberrimae fidei*, and to avoid abuses of rights. Unfortunately, however, Lauterpacht was called upon to deal with the question of good faith principally in connexion with two cases (the *Norwegian Loans* and *Interhandel* cases) in which, for reasons that in no way conflicted with his fundamental belief in the *obligation* of action in good faith, he felt compelled to hold that no assistance could, in the given case, be derived from this principle, which he thought could find no application in the particular circumstances of the case. This principle, he considered, had little practical sphere of operation unless a court was in a position to examine and assess the conduct of the State concerned, in the light of it. This, however, was just what he thought that the Court in the *Loans* and *Interhandel* cases could not do.²

Nevertheless, he affirmed the principle itself unequivocally. In the *Loans* case (*I.C.J. Reports*, 1957, p. 53) he said:

‘Unquestionably, the obligation to act in good faith, being a general principle of law, is also part of international law.’

Equally in the *Interhandel* case (jurisdiction) (*I.C.J. Reports*, 1959, p. 113), while refusing to admit that the principle could be applied in that case, he nevertheless said that there was ‘no question of ruling out the abiding duty

¹ See also the writer’s Hague Academy Lectures on ‘The General Principles of International Law’ in the *Recueil des cours* for 1957, vol. 92—II, p. 54.

² Discussion of the merits of this view is reserved for the second part of this study to appear next year.

of every State to act in good faith'. Again, in the *Guardianship of Infants* case, Lauterpacht made several references to the principle. Thus (*I.C.J. Reports*, 1958, p. 88) he made an allusion to

'... Dutch law which Sweden, by virtue of the Convention, is bound to recognise and ... respect for which she is bound to ensure *in good faith* [present writer's italics] without requiring any additional treaty arrangements for that purpose.'

(b) *Good faith in the exercise of a discretion or discretionary right*. In the *South-West Africa Voting Procedure* case, Lauterpacht affirmed the principle of good faith in the exercise of a discretion, saying (*I.C.J. Reports*, 1955, p. 120) that

'Both principle and practice would thus appear to suggest that the discretion which in the sphere of the administration of Trust Territories or territories assimilated thereto is vested in the Members of the United Nations in respect of the Resolutions of the General Assembly is not a discretion tantamount to unrestricted freedom of action. It is a discretion to be exercised in good faith. Undoubtedly the degree of application of good faith in the exercise of full discretion does not lend itself to rigid legal appreciation. This fact does not destroy altogether the legal relevance of the discretion thus to be exercised.'

Two points may be noticed here. First, the affirmation of the principle of good faith was a particularly striking one, since it was made in connexion with the actions of Member States of the United Nations relative to a class of instrument—the Resolutions of the General Assembly—which had no actual binding force for Member States. Secondly, Lauterpacht did not admit that the difficulty of appreciating or estimating whether a given action, or the adoption of a particular attitude, was in good faith, constituted a reason for ignoring that aspect of the matter—or, by implication, for doubting the capability of an international tribunal to evaluate it. Indeed he went on to evaluate it himself in the same case in connexion with the General Assembly's Resolutions about South-West Africa—(this will be considered in next year's article).¹ A further pronouncement on good faith in the exercise of a discretion was made by Lauterpacht in the *Guardianship of Infants* case, where he said (*I.C.J. Reports*, 1958, p. 101) that the Netherlands authorities had failed to bring to the notice of the Court 'any facts suggesting that the discretion of the Swedish authorities had not been exercised properly and in good faith'. A little earlier (p. 99) he had said:

'If a State takes action which, on the face of it, departs from the language of the Convention, then it cannot confine itself to proving generally that the Law under which it acted falls within the permissible exception; it must show that the exception was applied reasonably and in good faith.'

¹ Lauterpacht's attitude on the good-faith principle in the later *Norwegian Loans* and *Interhandel* cases is not altogether easy to reconcile with his attitude in the *Voting Procedure* case, but discussion of this is reserved for the present.

This was a particularly strong affirmation of the principle of good faith. Here Lauterpacht also propounded the test of reasonableness which runs like a red thread through his judgments and opinions.

(2) *Reasonableness*

Lauterpacht's views on this matter emerge clearly in the Joint Opinion of himself and Judges Wellington Koo and Sir Percy Spender in the *El Al* (*Aerial Incident*) case (*Israel v. Bulgaria*). On p. 188 (*I.C.J. Reports*, 1959) the Joint Opinion stated generally that in 'Applying a legal provision, the Court must not ignore the circumstances of fact relevant to the test of reasonableness', and on the following page characterized that test as itself deriving from the obligation of acting in good faith:

'It is consistent with enlightened practice and principle to apply the test of reasonableness to the interpretation of international instruments—a test which follows from the ever present duty of States to act in good faith. However, the test of reasonableness must itself be applied in a reasonable way: it must not be applied by reference to contingencies which are in themselves of a manifestly exaggerated character; it must not be applied by reference to examples bordering on absurdity. If a State invokes a provision, fully grounded in the treaty, after twelve years from the date of its adoption, it is contrary to the true test of reasonableness to defeat its claim on the ground that it would be wholly unreasonable for it to invoke the treaty after fifty or one hundred years. If the manner in which a State invokes a treaty in a particular case is reasonable, it is unreasonable to suggest that the interpretation on which it relies might in extreme cases produce unreasonable results. The Court is not confronted with a situation arising in 1905. It is faced with a situation which arose in 1957 when Israel invoked the jurisdiction of the Court.'

This passage may well come to be considered as a *locus classicus* on the matter.

§ 6. STATE RIGHTS AND INTERESTS ARE DISTINCT FROM THOSE OF INDIVIDUAL PERSONS OR ENTITIES

In the *Interhandel* case (jurisdiction) Lauterpacht stressed the important distinction between State rights and interests, and those of an individual person or entity, even where they relate to the same subject-matter or arise out of the same incident. Although a State on such an occasion speaks and acts for its national, its own position in relation to any wrong it has suffered in his person is never completely identified with his. This is so even where no more is involved or in issue than the wrong done to the individual. It is still more so in other cases. Thus, if there is a breach of treaty an individual may suffer damage as the result, but his Government always has an independent ground of complaint in relation to the wrong it has itself

suffered through the breach, in addition to the right of complaint on behalf of its national.

Lauterpacht, in a passage in which he based himself on a well-known dictum of the former Permanent Court in the *Chorzów Factory* case, said (*I.C.J. Reports*, 1959, p. 120):

'I cannot accept the contention of the United States that the demand for restitution which forms the subject-matter of the Swiss Application [*sc.* on behalf of Interhandel, a Swiss national Corporation] and which, in substance, is now being litigated before the Courts of the United States and the demand by the Swiss Government for arbitration and conciliation [see under a Swiss-U.S. treaty] are essentially one dispute. I consider that with regard to that aspect of the claim of Switzerland there apply, with some cogency, the principles which are now firmly rooted in the jurisprudence of the Court and which were clearly expressed in the Judgment of the Permanent Court in the *Chorzów Factory* case (Series A, No. 17, p. 28). The Court said there:

"... The rules of law governing the reparation are the rules of international law in force between the two States concerned, and not the law governing relations between the State which has committed a wrongful act and the individual who has suffered damage. Rights or interests of an individual the violation of which rights causes damage are always in a different plane to rights belonging to a State, which rights may also be infringed by the same act. The damage suffered by an individual is never therefore identical in kind with that which will be suffered by a State; it can only afford a convenient scale for the calculation of the reparation due to the State."

'There must exist weighty reasons for any departure from that principle so clearly formulated. That principle is not a mere doctrinal refinement. An international award may give to a State satisfaction different from restitution of the property seized; a State may have a legal interest, independent of any material compensation and restitution, in vindicating the remedy of arbitration provided for in the Treaty. It may also have a legal interest in having its right to arbitral proceedings determined as soon as possible without being exposed, after the local remedies have been exhausted, to a further considerable delay in establishing that right by a decision of this Court.'

§ 7. THE PLACE OF PRIVATE INTERNATIONAL LAW IN PUBLIC INTERNATIONAL LAW

In a course of lectures on 'The General Principles of International Law' published in the *Recueil des cours* for 1957, vol. 92—II, p. 221, the present writer suggested that, looked at from the standpoint of public international law, private international law—i.e. the body of rules and principles coming under that head which forms part of the law of every country—constituted one of the means whereby States discharged their *public* international law obligation of protecting and giving due effect in their territories to foreign interests, and the rights of foreigners. A somewhat similar view, which is in any case illuminating on the subject of the relationship between the two fields, was implied by Lauterpacht in the *Guardianship of Infants* case, in which (*I.C.J. Reports*, 1958, p. 94) he said:

'The purpose of private international law is to make possible the application within the territory of the State, of the law of foreign States. This is an object dictated by considerations of justice, convenience, the necessities of international intercourse between individuals and indeed, as has occasionally been said, by an enlightened conception of public policy.'

Here he did not in terms go so far as the present writer, who had suggested that there were aspects of a State's public international law obligations in the sphere of the treatment of foreigners which it would be positively unable to discharge without an adequate system of private international law rules. But in any event, Lauterpacht went on to indicate the undoubted limitations on any such duty when he said (*ibid.*, pp. 94-95):

'But there is an obvious element of simplification in the view that the law of a State should be deemed to have consented or that it should reasonably be expected to consent in advance to the application of foreign law without any limitations, in any circumstances whatsoever, without a safety valve, without a residuum of contingencies in which, because of the very nature of its structure, and the fundamental legal, moral and political conceptions which underlie it, it should be able to decline to apply it.'

Lauterpacht was here thinking mainly of a refusal to apply foreign law because of the home State's conceptions on *ordre public*. His views on that matter are considered in § 12 below.

§ 8. AFFIRMATION OF CERTAIN GENERAL LEGAL MAXIMS

(1) *Cessante ratione, cessat ipsa lex*

(a) *Disappearance of the rule.* In the *South-West Africa Oral Petitions* case, Lauterpacht applied this principle to the assumptions on which, in his view, the practice of the former League of Nations had been based in *not* hearing oral petitions from persons in mandated territories, but only written ones sent through, and with the comments of, the mandatory Power. As he considered that the Union of South Africa was no longer in effect operating the provisions of the Mandate, and was not co-operating with the United Nations as successor¹ to the League, Lauterpacht considered that the assumptions in question had ceased to apply. The League system, he said (*I.C.J. Reports*, 1956, p. 57):

'... was predicated upon the fulfilment by the Mandatory of its obligations in the matter of reports and petitions. As the result of the attitude now adopted by the Union of South Africa, that assumption no longer applies. The maxim *cessante ratione, cessat ipsa lex* is a trite legal proposition. This circumstance does not affect the propriety and the necessity of its judicial application.'

¹ The view that the United Nations was the successor of the League in this respect derived from the original basic Advisory Opinion on South-West Africa given by the Court in July 1950.

In commenting on this *dictum*, the present writer, in his 1959 article,¹ without suggesting that it was not justified in the *Oral Petitions* case, pointed out that the principle of *cessante ratione* required to be applied with some caution, and only in cases where the *ratione* had so effectively ceased to exist, that the continued application of the *lex* would be meaningless or inequitable. This maxim, he suggested, had in the field of general law somewhat of the same character and operation as the doctrine of *rebus sic stantibus* in the field of treaty law, and unless its use were equally strictly circumscribed, it might well afford means of evading a law which was itself in no way '*cessante*'.

(b) *Consequential disappearance of any qualifications to the rule.* In the same case Lauterpacht considered, similarly, that the failure of the Mandatory Power to furnish the information and reports called for under the Mandate affected the continued existence of the limitation which the Court, in its basic 1950 Opinion on South-West Africa, had imposed on its finding that the United Nations was the legal successor to the former League of Nations, as the supervisory authority; namely, that in exercising its supervisory functions, the United Nations must, so far as possible, follow League practice, and that the supervision must not result in creating for the Mandatory a more onerous system than previously. He said (*ibid.*, p. 45):

'If the Opinion of 11 July 1950 is read as a whole, then it is impossible, without destroying its effect, to maintain fully and literally provisions qualifying the operation of a system whose main characteristics have become inoperative. It seems unreasonable to uphold fully and literally the limitations of a rule after the possibility of giving effect to the rule itself has disappeared. To do that is to elevate the exception into a rule and to reduce the governing rule to a nullity. A court of law cannot give its sanction to any such simplification of logic.'

As the present writer pointed out in 1959,² there is a danger here of losing sight of a distinction of some importance. Lauterpacht presumably did not intend to suggest more than that in consequence of South Africa's attitude, the United Nations was released from a limitation to which, in his view, that institution would otherwise remain subject, namely not to hear oral petitions.³ It would be a different thing to go further and find that South Africa was now bound actually to co-operate in and facilitate a system of oral petitions. It cannot normally be the legal result of a breach of contract or treaty⁴ that the party in breach, not merely can be called upon to desist

¹ This *Year Book*, 35 (1959), at pp. 217-18.

² *Ibid.* pp. 219-21.

³ In this, Lauterpacht differed from the Court, which considered that it had lain within the powers of the League, even if it had not formed part of its actual practice, to hear oral petitions.

⁴ As will be seen later, Lauterpacht did not think the Mandate was an instrument of a fundamentally contractual character, and there is much to be said for this view; but undoubtedly contractual elements were involved.

from the breach, or make reparation for failure to do so, but can be required actually to carry out—not the obligation specified in the contract or treaty—but a new and distinct obligation, not therein contained.¹ This is not something which, unless given a special and specific power to do so, any court can normally decree. It can declare the breach, award damages or other reparations in respect of it, decree specific performance, or declare the manner and extent of the release of the other party in consequence of the breach, but no more. That Lauterpacht was aware of this difficulty is clear from another passage from the *Oral Petitions* case, in which he asked (*ibid.*, p. 48):

‘What, apart from the general principles of interpretation as set out above, is the authority for the proposition that the Court may replace one means of supervision by another, not previously authorised—nay expressly disallowed? This, it may be objected is not the way in which Courts normally proceed in the matter of contracts between individuals.’

His answer was twofold: that the United Nations supervision of the Mandate was a case of *succession*; and that under many systems of private law, the courts had power in matters involving a succession (e.g. wills, trusts &c.), if there was a danger of frustration, ‘to vary the original disposition in such a way as to make it approximate so far as possible to the general intention of its author’. The analogy between such a case and that of the Mandate for South-West Africa may be thought to be hardly close enough to be entirely convincing. It would appear, however, that in so far as his view was not merely that the United Nations was released by South Africa’s conduct from any limitation as to hearing oral petitions,² but also that South Africa herself became obliged to permit and facilitate them, this was because he viewed the Mandate not as an ordinary contract or treaty, but as a special régime-creating instrument.³ This was stated in a passage on p. 48 of the *Report* in the *Petitions* case following closely on that last cited. It is set out *in extenso* elsewhere here, in connexion with the régime or system-creating instrument as a source of law (see § 9 below).

There was a further matter related to his application of the *cessante* rule, in the light of which Lauterpacht clearly felt some uneasiness as to the

¹ It results from the Court’s view, as briefly indicated in n. 3 on p. 40, above, that it would not have considered that co-operation by the Mandatory in the hearing of oral petitions, if the League Council had decided to hear them, did involve any really new obligation. For the Court, therefore, this problem did not arise.

² A limitation which he, in contradistinction to the Court, thought would, in principle, exist, since he did not agree with the Court that it sufficed that the League had possessed the power to hear oral petitions, if such action was not part of its actual practice.

³ The Mandate for South-West Africa was certainly not contractual in *form*, as it consisted of a Resolution of the Council of the League which defined its terms. It embodied and confirmed certain points the subject of antecedent agreement, but specifically pointed out that ‘the degree of authority, control or administration to be exercised by the Mandatory’ not having ‘been previously agreed upon’ was, under Article 22, paragraph 8, of the League Covenant, ‘to be explicitly defined by the Council of the League’.

Court's finding (which was also his own though not on the same grounds) to the effect that, in the circumstances of the South-West Africa situation, the United Nations Assembly was entitled to hear oral petitions from persons in South-West Africa—namely, the compatibility of that view with the Court's previous finding in the second phase of the *Peace Treaties* case. He referred to the 'apparent inconsistency between the view which is put forward in this Separate Opinion¹ (and which in effect underlies the present Opinion of the Court) and that on which the Court seems to have based its Opinion of 18 July 1950 on the *Interpretation of the Peace Treaties (Second Phase)*', and pointed out that in the latter case, the Court 'declined to hold that the failure, contrary to their international obligations, of certain States to appoint representatives to the Commission provided by the treaties in question for settling disputes justified some alternative method of appointment not contemplated by these treaties'; that, as in the *Oral Petitions* case, 'the conduct of the States in question had thus created a gap—in fact a breakdown—in the operation of the system of supervision contemplated by the treaties'; yet that the Court had 'refused to admit the legality of an alternative method designed to remedy the situation'. He continued (*ibid.*, p. 58):

'The resemblance between the two cases is as striking as the apparent discrepancy between the present Opinion of the Court and that in the case of the *Interpretation of the Peace Treaties*. In view of this it is appropriate and desirable to state the reasons, if any, for this seeming departure from a previous Opinion.'

Lauterpacht went on to say that without expressing any view as to the merits of the finding of the Court in the *Peace Treaties* case,² he considered that in fact the two cases were dissimilar 'in a vital respect':

'The clauses of the Peace Treaties of 1947 relating to settlement of disputes were, as shown in their wording and the protracted history of their adoption, formulated in terms which clearly revealed the absence of agreement to endow them with a full measure of effectiveness—including safeguards to be resorted to in the event of the failure of one of the parties to participate in the procedure of settlement of dispute.'

In short, it was (*ibid.*) 'not accidentally, but by design' that the parties in the *Peace Treaties* case had not provided for this eventuality.³ Lauterpacht went on to distinguish the instant case as follows:

'This is not the position in the present case when the Court is confronted with the interpretation of provisions concerning a regime in the nature of an international status

¹ i.e. his own Opinion in the *Petitions* case.

² Had Lauterpacht at that time been a member of the Court, he might well have agreed with Judge Read's Dissenting Opinion based on the application of the 'effectiveness' principle of treaty interpretation, to which Lauterpacht was much attached. His views on this will be considered in next year's article.

³ To say that it was 'not accidentally' may be correct, in a sense; but to say it was 'by design' is to attribute intentions to the parties about something they probably never thought of at the time. It may well be that even had they thought of it, they would not have inserted any express

of established and continuous operation; provisions in relation to which the Court in the Opinion of 11th July 1950 and that of 7th June 1955 on the *Voting Procedure* affirmed in emphatic language the necessity of securing the unimpeded and effective application of the system of supervision in accordance with the fundamental provisions of the Covenant and the Charter. . . .'

Lauterpacht was certainly right in feeling that the difference between the views formulated by the Court in these two cases needed explaining,¹ and he could have carried the matter even a little further—for if in the *Peace Treaties* case it could be said that the parties (or at any rate one set of them) had deliberately refrained from making provision for a possible breakdown of the treaty machinery, so equally might it have been said that in the case of the mandates system, the parties (i.e. the League on the one hand and the mandatory Power on the other) had made provision for or instituted a practice of receiving and transmitting written petitions, but not in regard to oral petitions, or for making good a breakdown in the former by proceeding to the latter. The real basis of the distinction drawn by Lauterpacht seems to have lain in his view, already referred to (see p. 41 above), that the instruments embodying or making up the League of Nations mandates system were not—or were not merely—treaties in the ordinary sense, to which ordinary principles of contract law applied; but were régime or system-creating instruments of a semi-legislative character, having an objective legal effect not dependent solely on the original intentions of the parties. Only on some such basis, it would seem, can the finding of the Court in the *Oral Petitions* case be convincingly distinguished from its finding in the second phase of the *Peace Treaties* case, and it seems clear that this was the real basis of the distinction Lauterpacht drew. As already stated, his views about the special character of the mandates system are considered in § 9 below.

(2) *Nemo in re sua (in sua propria causa) judex esse potest*

(a) *Fundamental character of this principle.* In the earlier instance of the *South-West Africa Voting Procedure* case, which involved issues very similar to those that arose in the *Oral Petitions* case, the main question was whether, in dealing with South-West Africa matters, the United Nations Assembly could apply its normal voting rule, which meant proceeding by

provision about it, simply because they would probably not have been able to reach agreement on the terms of any such provision. The real point is that in the comparative innocence of those days, it would not have occurred to most of the Allied Powers that the ex-enemy States concerned would proceed to frustrate the whole dispute-settling machinery of the peace treaties by the simple process of (a) denying that a dispute existed, however much it might in fact obviously do so; and (b) in any event, refusing to appoint their arbitrators on the Treaty Commission.

¹ If the suggestion made in n. 2, p. 32, above is correct, the two cases would not, so far as Lauterpacht's personal views were concerned, have needed differentiating, since he would have found in the same way in both, on the basis of the 'effectiveness' principle.

either a simple or a two-thirds majority, according to circumstances; or whether the Assembly must apply the rule of the League Council, the former supervisory body. This rule was, or so it was alleged, technically that of unanimity.¹ The Court found means of not having to go into this question; but Lauterpacht, who (see § 1 above, p. 18) thought that this was one of the issues on which the Court ought to pronounce, did go into it, and found that in relation to the supervision of the exercise of mandates, the League Council's procedure had not in fact been, and could not have been, by way of strict unanimity. In so doing, he was much influenced by the principle *nemo iudex in re sua*, which he considered to be not only fundamental to all disputes, but of wide general application, not confined to strictly judicial proceedings (*I.C.J. Reports*, 1955, pp. 98–99):

‘Admittedly, the procedure of the Council of the League of Nations was governed by the principle of unanimity not only of the Members of the Council but of States who, though not ordinarily Members thereof, were invited to sit at its table in connection with a matter under its consideration—a rule which applied also to the representatives of the Mandatory State invited to take part in the proceedings of the Council. However, having regard both to principle and practice, as I interpret them, the ruling of the Court, given in its Twelfth Advisory Opinion on the *Interpretation of the Treaty of Lausanne*² must be held to apply also to the question with which the Court is now concerned. In that case, the Court held that the principle which was enshrined in Article 15 of the Covenant and which excluded the vote of the parties to the dispute from the requirement of unanimity as a condition of the validity of a recommendation made by the Council, was of general application in so far as it embodied the “well-known rule that no one can be judge in his own suit”.’

Continuing, Lauterpacht said (*ibid.*, p. 99):

‘That “well-known rule”, henceforth sanctioned by a pronouncement of the Permanent Court of International Justice, must be held to apply to the case in which an international organ, even when acting otherwise under the rule of unanimity, judges in a supervisory capacity the legal propriety of the conduct of a State administering an international mandate or trust. The supervisory organ may do so either directly by pronouncing a verdict upon the conformity of the action of the administering State with its international obligations or indirectly by calling upon it to adopt—or desist from—a certain line of action.’

So fundamental was this principle in Lauterpacht's view, that it must be assumed to be part of, and an *a priori* qualification to, the very rule of unanimity even where expressly laid down. Thus even ‘the rigid wording of Article 5 of the [League] Covenant, which laid down that, unless expressly

¹ The point being that the Court had laid down in its main (1950) Opinion that the supervision to be carried out by the United Nations should not be exercised in a manner more onerous for the mandatory Power than under the League. This, of course, was precisely the consequence likely to flow from a voting rule making the adoption of a decision not concurred in by the Mandatory possible.

² *P.C.I.J. Reports*, Series B, No. 12, p. 32. This case is also variously known as the *Turkey and Iraq Frontier* case, and the *Mosul Boundary* case.

provided to the contrary, the rule of unanimity should obtain', must be read in that sense, for (*ibid.*, pp. 99-100)

'... in the absence of a clear provision to the contrary, that rule is in itself qualified by the principle laid down by the Permanent Court of International Justice in the Advisory Opinion on the Interpretation of the Treaty of Lausanne. In that Opinion the Court considered this rule to be of general application for the decisions of the Council when acting in a judicial or arbitral capacity.'

In further elaboration of this view Lauterpacht later (*ibid.*, pp. 104-5) said:

'There is ... no conclusive factor which is apt to override the basic legal considerations to which I have referred above, namely, that in an instrument such as the Covenant of the League of Nations the general requirement of unanimity is not in itself sufficient to displace the principle that a party cannot be judge in its own case; that the requirement of unanimity, however expressly stated, is implicitly qualified by the latter principle; and that nothing short of its express exclusion is sufficient to justify a State in insisting that it should, by acting as judge in its own case, possess the right to render inoperative a solemn international obligation to which it has subscribed. This principle ought to be kept prominently in mind when it is a question of the supervised State claiming the right to frustrate by its own vote the legal efficacy of the supervision. The effectiveness of international obligations may not be the only governing consideration in the interpretation of treaties seeing that the parties occasionally intend to render them less effective than is indicated by their apparent purpose. But it is a consideration which cannot be ignored. In so far as the principle *nemo iudex in re sua* is not only a general principle of law, expressly sanctioned by the Court, but also a principle of good faith, it is particularly appropriate in relation to an instrument of a fiduciary character such as a mandate or a trust in which equitable considerations acting upon the conscience are of compelling application. This too, is a general principle of law recognized by civilized States. There is therefore no sufficient reason for assuming that if the Permanent Court of International Justice had been called upon to apply its ruling in the Twelfth Advisory Opinion to the question of unanimity in connection with the supervisory function of the Council in the matter of mandates, it would have abandoned the principle there enunciated.'

These findings do not, of course, mean that a right for the parties to participate in the decision may not be expressly reserved to them, or even result from a clear inference; and a conspicuous example of the latter is to be found in the Charter of the United Nations.¹ Furthermore there are certain

¹ To cite a previous passage of the present writer's explaining this (*Year Book*, 35 (1959), p. 228): '... Article 27, paragraph 3, of the Charter, after specifying that decisions of the Security Council on non-procedural matters are to be taken by an affirmative vote of seven members, including the concurring votes of the permanent members, adds a proviso to the effect that "in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting". It is a necessary inference from this that the disability does not apply (i) to decisions of the Council taken under other Chapters or provisions of the Charter, (ii) to decisions taken even under Chapter VI, or paragraph 3 of Article 52, where what is before the Council is not a "dispute" *stricto sensu* but a "situation", so that although the voting member may in general terms be an interested party, it is not a party to a dispute which, *as such*, is before the Council.' As is well known, under Articles 34 and 35 of the Charter, the Security Council may be seised not only of actual disputes, but also of 'situations' which, to quote the relevant passage in Article 34, 'might lead to international friction or give rise to a dispute'.

natural limits to the principle *nemo judex in re sua*, or a State could never, for instance, adjudicate as between itself and one of its subjects through a judiciary paid by the State and constituting a State service (see further as to this, the present writer's 1959 article, footnote 3 on p. 228). But the general validity of and necessity for the principle is not open to doubt, and in effect Lauterpacht made it the basis of a large part of his finding as to the invalidity of the 'automatic' type of reservation to acceptances of the compulsory jurisdiction of the Court (this will be considered in next year's article).

(b) *Application of the nemo judex in re sua principle to non-judicial as well as to judicial proceedings.* Lauterpacht admitted the element of novelty involved by this aspect of the matter in the following further passage (*ibid.*, p. 100):

'It must be conceded that the application of the principle *nemo judex in re sua* to what is in essence a controversy between the mandatory and the otherwise unanimous Council constitutes an extension of that principle as laid down by the Court. However, the extension is more apparent than real. For the reasons stated above, there does not seem to exist any solid ground for distinguishing between decisions taken in pursuance of the supervisory functions of an international organ and decisions of a judicial or arbitral nature such as that with which the Council of the League was confronted in the matter of the determination of the boundary between Turkey and Iraq. In all cases in which there is a difference of opinion, brought to the point of a formal discordant vote, between the supervisory organ and the administering authority as to the conformity of the conduct of the latter with its international obligations, such difference has the essential elements of a dispute as to the application of a binding international instrument. In any such controversy the principle that no one is judge in his own cause must be deemed to apply. To put it differently, there is no valid reason for distinguishing, in connection with the applicability of the principle that no one is judge in his own cause, between the judicial and the supervisory organs. Both administer, in different ways, a system of binding rules of conduct.'

This is true, and more or less self evident, in those cases where judicial proceedings between States are involved, or result. What has to be borne in mind is that—in the present condition of the international community, and despite the many objections to any system involving a 'veto'—there may, in the proceedings of international organizations, be solid reasons of policy for allowing countries which are parties to a dispute (or otherwise involved in the proceedings) to participate in any vote taken. For this reason, international instruments do often make precisely the distinction Lauterpacht referred to, but, of course, they do so expressly or by unmistakable implication.

(3) *Nemo ex sua propria injuria commodum capere potest*

(a) *The principle stated.* In the *Oral Petitions* case, Lauterpacht in effect lent his authority to this principle by referring (*I.C.J. Reports*, 1956, p. 47)

to the fact that in its Advisory Opinion in the *Jurisdiction of the Dantzig Courts* case,¹ the former Permanent Court had

‘formulated the principle that a State cannot avail itself of an objection which would amount to relying on the non-fulfilment of an obligation imposed on it by an international engagement.’

In the given case (*ibid.*) he thought it would be ‘a possible submission’ that this was

‘... an instance of a government claiming to benefit from its own wrong by declining to supply and transmit information which according to the [Court’s] Opinion of 11 July 1950 [the main South-West Africa Opinion], it is legally bound to transmit, and at the same time resisting the contemplated effort to obtain alternative information.’

This was because (a very good example of his essential fair-mindedness) Lauterpacht recognized (*ibid.*) that

‘... it may not be easy to characterise precisely in legal terms a situation in which South Africa declined to act on an Advisory Opinion which it was not legally bound to accept but which gave expression to the legal position as ascertained by the Court and as accepted by the General Assembly.’

In short, South Africa might be guilty of a wrong, but the act was one which, in a highly controversial issue, had been judicially found to be wrong, by means only of a pronouncement that was not legally binding on South Africa, which continued to hold the view that, with the demise of the League, the Mandate had ceased to be operative so that South Africa was committing no real wrong in refusing to supply and transmit information, &c.

(b) *The estoppel aspect.* It is an interesting fact that Lauterpacht seems to have thought that estoppel might be an aspect of the *nemo ex sua injuria* principle; for although he said (*ibid.*) in connexion with the foregoing passages that he did not suggest ‘that this is technically a case of estoppel’, yet there was, he thought,

‘... a measure of contradiction, reminiscent of situations underlying estoppel, in the fact that an instrument [the Mandate] repudiated by a Government is being invoked for the benefit of that Government.’

This, as a statement of principle, is of course correct, yet a government can hardly be said to be ‘invoking’ an instrument at all when, that instrument being invoked *against* such government, it pleads (a) that the instrument is no longer in force, (b) alternatively, that if it is still in force, it does not involve the obligation contended for.

(c) *Limitations on the principle.* In the above cited passages, Lauterpacht not only affirmed the principle *nemo ex sua injuria commodum capere potest* (or alternatively *ex injuria non oritur jus*), but also indicated some situations

¹ *P.C.I.J. Reports*, Series B, No. 15, p. 1.

in which, despite possible appearances to the contrary, this principle did not apply, or rather, in relation to which it did not arise. He did this still more positively in another class of instance, the *Interhandel* (jurisdiction) case, in a passage which again demonstrated his essential fair-mindedness and objectivity. Holding as he did the view (the merits of which will be discussed in a further article) that an invalid reservation of the so-called automatic type, attached to a Declaration purporting to accept the compulsory jurisdiction of the Court, was not merely itself invalid, but invalidated the entire acceptance as such, leaving the State concerned in the position of a non-acceptor, over whom the Court had no compulsory jurisdiction, either in the instant case or at all, he added (*I.C.J. Reports*, 1959, p. 118):

‘It is not permissible to attach importance to the circumstance that a decision of the Court holding the Declaration of Acceptance made by the United States of America to be ineffective and invalid would, in this particular case, enure to the benefit of the very State which made that kind of Declaration. This is not a case of a State benefiting from its own wrong. As already stated, there is no element of illegality involved in a Declaration of Acceptance which is inconsistent with the Statute of the Court. No rule of international law forbids governments to perform acts and make declarations which are incapable of producing legal effects.’

This view was certainly correct in the context. It may be worth noting that the case is different where the law specifically makes it a wrong to enter into an invalid transaction or perform an invalid act. Thus a man who goes through a bigamous marriage ceremony is not absolved from being guilty of an offence merely because the ceremony is in law null and void and no marriage has resulted.

Lauterpacht drew attention to a related aspect of the same matter when he continued as follows (*ibid.*, pp. 118–19):

‘Neither is there any sanction involved in treating such a Declaration of Acceptance as legally non-existent. For it operates equally . . . in relation to the declarant State and to its actual or potential opponents. There is no sanction involved in giving full effect to the condition on which, and on which alone, a State has accepted the jurisdiction of the Court. The United States cannot avail itself of its—legally ineffective—Declaration of Acceptance in order to bring an action before the Court against another State; but for the very reason that the Declaration is legally ineffective no State can invoke it against the United States. Such indirect sanction as there is—and it is one with which the Court cannot be concerned—is of a different nature. While it unfailingly protects the declarant Government from the jurisdiction of the Court it deprives it, with equal certainty, of the benefits of that jurisdiction in cases in which the declarant Government is the plaintiff.’

This was something which Lauterpacht did well to point out, for it is too often forgotten that non-acceptance, or a limited acceptance, of the Court’s compulsory jurisdiction, though it may assist the State concerned as defendant, handicaps it as plaintiff. Still, it is perhaps true that the considera-

tions to which Lauterpacht drew attention operate in the long rather than in the short term. The immediate consequence of finding an acceptance invalid on the ground that a reservation attached to it is invalid is precisely the same, in relation to the given case, as the effect the reserving State intended to achieve by its reservation—namely that the Court has no jurisdiction to hear and determine the case; and the reserving State can always avoid the worst of the long-term disadvantages mentioned in the last sentence of the above passage by renewing its acceptance in a fresh Declaration omitting the offending reservation, or framing it in non 'automatic' terms.

(4) *Res inter alios acta*

In the Joint Opinion which Lauterpacht participated in together with Judges Wellington Koo and Sir Percy Spender in the *Aerial Incident (El Al)* case, attention was drawn to a fallacy attendant upon the well-known principle that, for 'third States', transactions which are *res inter alios acta* are not binding. The fallacy is an obvious and elementary one; yet for all that, it is not infrequently relied upon, in one form or another, by States which wish to adhere to an existing multilateral instrument or to join an international organization (not having been original signatories or members), but which also desire, if possible, to avoid some of the consequences involved. It was stated in the Joint Opinion (*ibid.*, p. 176) that

'... there is no legal basis for the assertion that, while the original Members of the United Nations could bind themselves in the matter of the transfer of the declarations under paragraph 5 of Article 36 of the Statute, they could not bind other States subsequently adhering to the Charter. It is of the very essence of the Charter that its provisions—all its provisions—bind States which adhere to the Charter subsequent to its coming into force. If Article 36 had provided unconditionally for the obligatory jurisdiction of the Court—and not merely for the maintenance of existing declarations in accordance with their terms—it would be binding not only upon original Members but also upon all States subsequently adhering. It would not be *res inter alios acta* in relation to those States. That proposition is too fundamental to require elaboration. We consider it imperative that in deciding any particular controversy, which may be of a passing character, no countenance should be given to general propositions such as that there is a difference, with regard to any obligations of the Charter, between original Members and others; or that any provision of the Charter can be *res inter alios acta* in relation to States subsequently adhering; or that the obligations of a judicial settlement must be interpreted by reference to standards more exacting than the interpretation of other obligations of the Charter.'

(5) *Quicumque exceptio invocat, ejusdem probare debet*

In the *Guardianship of Infants* case, Lauterpacht enunciated this principle as follows (*I.C.J. Reports*, 1958, p. 100):

'A State invoking an exception cannot be too forthcoming in producing evidence

in justification of it. It ought not to limit itself to vague—and, from the point of view of ordinary rules of evidence, probably inadmissible—allusions as to the possible contents of the evidence, which, by its own decision it has failed to produce.’

(6) *Quieta non movere*

The principle of letting sleeping dogs lie unless there is good reason for disturbing them; of letting existing situations continue unless there is cause for ending or changing them—a principle of some importance in the international field and one that had been affirmed by the Permanent Court of Arbitration in the *Grisbardana* case (*Sweden v. Norway*)¹ was also briefly referred to (and affirmed) by Lauterpacht in the *Guardianship of Infants* case (*ibid.*, p. 101):

‘At the same time, in the exercise of its jurisdiction to review, a legal tribunal must attach importance to the appreciation of the facts by local authorities. . . . Their decision must not be lightly disturbed.’

(7) *De singularis curat etiam lex*

In the *Aerial Incident (El Al)* case, the Joint Opinion of Lauterpacht and Judges Wellington Koo and Sir Percy Spender repudiated the idea that a controversial interpretation of a certain provision, arrived at not so much on its actual wording as on the introduction of a number of extraneous elements, could be justified merely because of the limited scope it would or might have. Even if in practice the interpretation in question had an adverse effect only on the position of a few States—possibly of one alone—this could not in itself be a ground for adopting that interpretation, or operate as a mitigation of any such adoption (*I.C.J. Reports*, 1959, p. 191):

‘There is a lack of cogency in the suggestion that the result of the interpretation there adopted by way of introduction of extraneous elements is, today, to exclude in effect only a small number of States—perhaps merely one—from the operation [*sc.* benefit] of that provision. The legal right of a State must not be disregarded for the reason that it is the right of one State only.’

This was clearly right where the result of the interpretation concerned would cut down State rights; and it was also in harmony with Lauterpacht’s well-known concern for giving treaty provisions their maximum effectiveness, wherever possible. It was therefore logical that in an earlier passage, the Joint Opinion should have rejected a view which, based on regard for only minimal State interests, would have cut down the scope of the provision in question. This was also in conformity with Lauterpacht’s normal view that, in arriving at any conclusion, and in particular in considering whether a given interpretation of a provision was reasonable, regard must be had to the magnitudes and proportions involved. This

¹ See Award of 23 October 1909, Scott, *Hague Court Reports* (1916), p. 130.

point arose because the Court had found adversely to the view of paragraph 5 of Article 6 of the Statute put forward by Israel, on the ground (*inter alia*) that the interpretation thereby contended for might result in subjecting certain States to the jurisdiction of the Court without their express consent, and possibly contrary to their will. The Joint Opinion, however, pointed out (*ibid.*, p. 184) first, that only three States then remained who might be placed in such a position; and secondly, that as regards these States, 'any dangers of their premature adherence to the Statute or any kind of uncertainty were fully met by the fact that in order to become parties to the Statute they would either have to be admitted to the United Nations or comply with the conditions determined by the Security Council and the General Assembly in accordance with Article 93 (2) of the Charter'. The Joint Opinion then concluded (*ibid.*):

'In our view there is no room for an interpretation which alters the terms of paragraph 5 and reduces its effectiveness by reference to realities of such small compass.'

§ 9. SOURCES OF LAW: THE RÉGIME OR SYSTEM-CREATING INSTRUMENT AS A SOURCE OF LAW

While the matter is not free from controversy, it is now generally recognized in international law that certain classes of instruments, though they may be contractual as to the manner of their framing and conclusion, and even as to their actual form, are or become, in varying degrees (depending on their subject-matter and the circumstances of the case) extra-contractual in their application and effects. Instruments of this character create a régime or system, or invest something with a character or status, which is good, and applies, *erga omnes*, and not merely as between those States which have originally, or subsequently, actually subscribed to the instrument as such. It may equally be noticed that so-called 'law-making' treaties may in fact do no more than codify accepted existing rules of customary law, and thus be no more than declaratory in effect: but that, on the other hand, they may embody new rules or principles, which, though at first only applicable in the relations between the actual parties to the instrument, may come to be generally regarded as stating what the law should be, if not what it is already—and in that event, even if the instrument itself does not have any application *erga omnes*, it nevertheless gives expression to rules that have come to be regarded as being of general application.

Lauterpacht attached much importance to the legal character of instruments having these creative effects, and insisted on their capacity for setting up objectively valid legal situations, not, or no longer, dependent exclusively on the will of the actual parties to them, and therefore to be

interpreted and applied as pieces of legislation (or as having a quasi-legislative character) rather than as ordinary contracts or treaties. It has already been seen (see pp. 40–41 above) that to a large extent Lauterpacht's findings on the South-West Africa question turned on his view that the Mandate for that territory belonged to this class of instrument. In the course of formulating this view, he gave his own, and very interesting description, of the character of such instruments; of their effects; and of the differences that exist between them and those of a simply contracted character. Conceding as has been seen (see p. 41 above) that it is not a normal part of the judicial function for Courts to re-write a contract, or impose on a party an obligation different from what the contract contains, he said in the *Oral Petitions* case (*I.C.J. Reports*, 1956, pp. 48–49) that, however, the instant case was

'... not a case of a contract or even of an ordinary treaty analogous to a contract. As already pointed out this is a case of the operation and application of multilateral instruments, as interpreted by the Court in its Opinion of 11 July 1950, creating an international status—an international regime—transcending a mere contractual relation (*I.C.J. Reports*, 1950, p. 132). The essence of such instruments is that their validity continues notwithstanding changes in the attitudes, or the status, or the very survival of individual parties or persons affected. Their continuing validity implies their continued operation and the resulting legitimacy of the means devised for that purpose by way of judicial interpretation and application of the original instrument. The unity and the operation of the regime created by them cannot be allowed to fail because of a breakdown or gap which may arise in consequence of an act of a party or otherwise. Thus viewed, the issue before the Court is potentially of wider import than the problem which has provided the occasion for the present Advisory Opinion. It is just because the regime established by them constitutes a unity that, in relation to instruments of this nature, the law—the existing law as judicially interpreted—finds means for removing a clog or filling a lacuna or adopting an alternative device in order to prevent a standstill of the entire system on account of a failure in any particular link or part. This is unlike the case of a breach of the provisions of an ordinary treaty—which breach creates, as a rule, a right for the injured party to denounce it and to claim damages. It is instructive in this connection that with regard to general texts of a law-making character or those providing for an international regime or administration the principle of separability of their provisions with a view to ensuring the continuous operation of the treaty as a whole has been increasingly recognised by international practice. The treaty as a whole does not terminate as the result of a breach of an individual clause. Neither is it necessarily rendered impotent and inoperative as the result of the action or inaction of one of the parties. It continues in being subject to adaptation to circumstances which have arisen.'

To comment on this pronouncement would mean entering on a very wide and complex field of international law,¹ and the passage may be left to speak for itself, as a major judicial *dictum* on the subject.

¹ The whole subject is considered in a fairly exhaustive way in the 5th Report on the Law of Treaties ('Treaties and Third States') which the present writer contributed as Special Rapporteur on Treaties, for the International Law Commission of the United Nations, 1960.

§ 10. PARTICULAR POINTS OF INTERNATIONAL LAW:

(1) THE EXHAUSTION OF LOCAL REMEDIES RULE

(1) *Statement of the main issues*

(a) *In General.* It could be said that virtually all the difficulties—and to this day they remain such—that are attendant upon the subject of the exhaustion of local remedies revolve round three or four points. The rule—known for short as the local remedies rule—is accepted as one of the best established and, in principle, least questioned rules of international law: yet its precise scope and application can be highly controversial. The rule requires that in every case (or in certain kinds of cases—but that is part of the controversy) in which (a breach of international law involving the responsibility of the State being alleged) the local law of the State impugned affords (or if resorted to would have afforded) remedies,¹ these must be exhausted by the claimant party—either as a condition precedent to there being a possible infraction of international law at all, or as a condition of the formulation of a receivable international claim in respect of the alleged infraction. Somewhat less compressed, the last point means one of two things. There may, in the final analysis, be no breach of international law at all until all legal remedies have been exhausted—the breach consisting in the very failure to afford a remedy, provided it be an improper failure. In that case, no question of any breach can arise until all such remedies have been exhausted. In the second category of case, the breach can be established (or at any rate alleged) independently of the action of the local tribunals; but in that event, a bar to the admissibility of any international claim in respect of the breach continues so long as any remedies afforded by the local law in respect of it have not been exhausted. These two aspects might be called respectively the substantive and the procedural aspects of the local remedies rule. In its substantive aspect, the rule operates, not so much as a preliminary objection, but rather as a direct plea to the merits, i.e. if local remedies have not been exhausted, there is not, or there is not yet, any substantive breach of international law at all, and the tribunal must find in favour of the defendant State on the merits. In its procedural aspect, the rule operates as a preliminary objection *pro tempore* to the *admissibility* of the claim; and if upheld by the tribunal, will rule out any decision on the merits²—i.e. there may or may not be a breach of international law, but an international claim will not lie, and cannot be examined by an international tribunal—until local remedies have been exhausted.

¹ Assuming, of course, that the claimant, plaintiff or appellant, is in the *right*. This point is considered below, and is of the first importance.

² Theoretically, a *joinder* of the issue to the merits would be possible, but inappropriate unless (which would not here be the case) the breach lay in the very failure (improperly) to afford a remedy.

Parallel with all this is the question of what constitutes a 'remedy' for the purposes of the application of the rule; and there is also one further, highly preliminary, issue to be mentioned presently.

The main questions that arise might therefore be formulated as follows:

1. Does the local remedies rule apply in every case in which a breach of international law or treaty is alleged, and the local law of the defendant State in principle affords remedies (if its courts recognize the existence of the breach) or could do so if invoked; or are there cases, or classes of cases, to which the rule has no application, even if the local law could afford a remedy if resorted to? Here three possible situations may be postulated: (a) the claim arises exclusively out of a wrong alleged to have been done to a national of the claimant State; (b) the claim has a double aspect involving an alleged wrong to the national, but additionally and independently a wrong to his State;¹ (c) the alleged wrong is exclusively to the State.²

2. In what cases does the rule operate as a bar to admissibility and in what as a plea to the merits (see above, p. 53)? This question is related to the first, but has independent aspects.

3. What constitutes a 'remedy' for the purposes of the application of the rule; must every actual or apparent remedy be invoked and, in general, what is the kind of remedy non-resort to which will bring the objection into play?

4. Where does the burden of proof lie of establishing, as the case may be (a) that local remedies existed, but have either (i) not been resorted to at all, or (ii) have been resorted to, but have not been fully exhausted; (b) that although such remedies existed, they were not of the kind to which the rule relates, or otherwise that non-resort to them is no bar to the claim?

(2) *The Case of an alleged breach of State rights*

The most controversial of the questions arising under the first of the above heads is whether the local remedies rule applies, not only where the claim is made on behalf of a private person or entity, but also where it is made, either in whole or in part, in respect of an alleged direct breach of international law as between State and State. This matter, which has several aspects, cannot be gone into here, but some indication of what might in general have been Lauterpacht's judicial attitude towards it is

¹ e.g. an alleged breach of, say, a commercial treaty; or interference with a ship on the high seas, involving damage or loss by delay to the shipowner, but also 'flag prejudice' to the State of registration.

² Of course, all wrongs to an individual involving breaches of international law are, or are also, wrongs to his State; and might even, on one view, be said to be wrongs exclusively to the State, the national being merely the *corpus vilis* of the claim. But the above rough and ready classification will do for present purposes.

afforded by what he said in the *Interhandel* case (jurisdiction) in relation to the United States contention that not only was the Swiss claim for restitution on behalf of the Interhandel Company barred on account of the failure of that Company to exhaust its legal remedies in the United States, but so also—for the same reason—was the Swiss alternative claim that the whole matter ought to be, or should have been, referred to an arbitral tribunal under certain United States–Swiss agreements for the settlement of disputes by arbitration or conciliation. The point was that these agreements involved a direct United States–Swiss international obligation, distinct from, and additional to, the vicarious interest and right of the Swiss Government founded on an alleged injury done to one of its national corporations.

The Court agreed with the United States contention, broadly on the ground that the case in all its aspects was governed (so far as the application of the local remedies rule was concerned) by the fact (*I.C.J. Reports*, 1959, p. 29) that ‘one interest, and one alone, of Interhandel . . . has induced the Swiss Government to institute international proceedings’, and that this interest ‘is the basis for the present claim and should determine the scope of the action brought before the Court by the Swiss Government in its alternative as well as in its principal form’.

Lauterpacht, as has been seen, disagreed with the view which might be thought to result from the Court’s finding on this point (though it does not seem necessarily to follow), namely that the Swiss demand for restitution, and the demand for arbitration or conciliation, were ‘essentially one dispute’. He also disagreed with the view that the local remedies rule applied to the second demand, i.e. that the alleged failure of Interhandel to exhaust legal remedies, if such failure there had been,¹ constituted a bar to a claim by the Swiss Government based on the United States–Swiss treaties of arbitration and conciliation. He said (*ibid.*, p. 120) that he could not associate himself with the decision ‘holding that the subsidiary claim of the Government of Switzerland relating to the obligation of the United States to submit the dispute to arbitration or conciliation is inadmissible on account of the non-exhaustion of local remedies by Interhandel’. From the further remarks cited earlier in another context it is clear that he took this view because he considered that the so-called subsidiary or alternative claim of the Swiss Government involved direct treaty rights and obligations on the interstatal level that could not be affected by Interhandel’s non-exhaustion of local remedies. Whether the position would have been the same in his view had the United States provided remedies in its courts for any alleged failure by it to observe

¹ He did not say whether he thought there had in fact been such a failure, as he considered that the issue was one that, in this particular case, ought to be joined to the merits.

the treaties is another matter; but such a situation would in any case be rare.

In the *Norwegian Loans* case Lauterpacht made pronouncements dealing mainly with the third and fourth of the classes of issue listed on p. 54 above, though necessarily not in such a way as to deal with any of these points fully—nor will the present writer here attempt further comment on them. Lauterpacht's views as stated in the *Norwegian Loans* case will be considered in their various aspects under the remaining heads of the present section.

(3) *Non-exhaustion of local remedies not a ground for characterizing the dispute as being of domestic jurisdiction*

In the first place, Lauterpacht dealt in the *Loans* case with a point that, if it arises at all, precedes all those noticed above, namely whether the allegation that local remedies have not been exhausted can ever be in itself a ground for contending that the matter in hand is one primarily of domestic jurisdiction. Lauterpacht considered that the Norwegian preliminary objection, to the effect that the French holders of Norwegian bonds which Norway was said not to have repaid in the manner required under the terms of the loan agreements, was closely related to the Norwegian plea that the entire matter was one appertaining exclusively to Norway's national jurisdiction (as to which see above, § 4, pp. 29–30) 'in the sense that, as repeatedly emphasised by the Norwegian Government in the written and oral proceedings, it is the failure to exhaust local remedies which has prevented the dispute from acquiring the complexion of a dispute concerning international law'. Put in that way, this idea was one which Lauterpacht rejected *in toto*. After pointing out, as has already been seen (see above, p. 30), that the dispute involved a number of clear and familiar points of international law, and could not therefore be one of domestic jurisdiction in the international law sense of that concept, he continued (*I.C.J. Reports*, 1957, p. 38):

'The relevance of these questions of international law cannot properly be denied by reference to the fact that unless and until the Norwegian Courts have spoken it is not certain that there has been a violation of international law by Norway. The crucial point is that, assuming Norwegian law operates in a manner injurious to the French bondholders, there are various questions of international law involved. To introduce in this context the question of the exhaustion of local remedies is to make the issue revolve in a circle. The exhaustion of local remedies cannot in itself bring within the province of international law a dispute which is otherwise outside its sphere.'

He therefore concluded (*ibid.*):

'The failure to exhaust local remedies may constitute a bar to the jurisdiction of the Court; it does not affect the intrinsically international character of a dispute.'

- (4) *Distinction between the case where the international wrong arises out of the particular application of the local law by the courts, and where it arises out of the character of that law itself*

As regards the type of case to which the local remedies rule applies, Lauterpacht, without making any general pronouncement, commented on the failure of the French Government to cause their bondholder nationals to have adequate recourse to the Norwegian courts. He said (*ibid.*, p. 41):

'There seems to run through the submissions of the French Government the apprehension that after Norwegian Courts have finally dismissed the claim of the French creditors the only claim internationally available to the French Government would be on account of denial of justice. This is probably not so.'

Here Lauterpacht touched on one of the most important and difficult aspects of the local remedies rule. It would be far too big an undertaking to go into it fully here; but very briefly, it is the case that in a dispute in the courts of any given country between individuals or companies, one or both of which are of foreign nationality, and also (in many cases) in an ordinary litigation between a foreigner and the local Government, no international claim will lie merely on the ground (a) that the foreigner loses his case, and (b) that the decision is in fact wrong or mistaken under the local law, and ought to have been in his favour; *provided* that no denial of justice, in the proper acceptance of that term in relation to a judicial decision, is involved—i.e. provided the decision, though *mistaken*, was given honestly and in good faith by a properly constituted and normally competent court. Of course, the nature and degree of the error in question may, on a basis of *res ipsa loquitur*, afford in itself evidence that the court cannot have been acting honestly, or else lacked the standards of competence required of the courts of civilized countries; but short of that, or of direct independent evidence of dishonesty or culpable incompetence, it is recognized under international law that courts (like all human institutions) are fallible, and that the State cannot be held responsible for their *bona fide* mistakes in the application of the law they administer, provided no more than a mistake is involved.¹

It may, however, be a very different matter if the law the courts are obliged to administer—the national law—is *itself* defective from the point of view of international law, being either directly contrary to the latter, or

¹ This was an important issue in the third phase of the *Ambatielos* case (*Greece v. The United Kingdom*, only the first two phases having been heard before the International Court) when the merits were finally pronounced on by an arbitral commission sitting in London and consisting of Dr. R. J. Alfaro (President), Dr. Algot Bagge, Professor Maurice Bourquin, M. Jean Spiropoulos and Sir Gerald Thesiger. Unfortunately, a great deal of the most important legal material is in the written and oral pleadings, which remain unpublished. Although both the Greek and United Kingdom Governments agreed that there was no objection to publication, H.M. Stationery Office felt unable, on the score of expense, to publish more than the text of the actual decision. The pleadings in the *second* phase of the case before the International Court, however, contain material covering some of the same ground.

producing, as applied in the given case, results that are so contrary. For such a situation, the State is automatically responsible. This is what Lauterpacht had in mind in the passage above cited, and immediately after the words 'This is probably not so', he continued (*ibid.*):

'A final adverse decision of Norwegian Courts would still leave it possible for the French Government to contend that Norwegian legislation, as finally upheld by Norwegian Courts, is contrary to international law.'

The point is that if this is correct, the 'final adverse decision' need *only* be 'adverse', in order to clear the way for an international claim, and need not additionally constitute a 'denial of justice' in the sense that would be requisite for the other category of case.

(5) *Admissibility aspects*

Lauterpacht also rightly considered that any plea of non-exhaustion of local remedies—in a case where the complaint consisted of an allegation that the local law (or the interpretation given to it in the instant case) was contrary to international law—constituted a bar to the *admissibility* of the claim, and not merely an argument as to its substantive merits; for the action of the judiciary was not constitutive of the wrong—it merely gave effect to, or failed to remedy, an alleged antecedent wrong, namely legislation which, as properly interpreted according to local law, already involved (or must lead to) a breach of international law. In such a case, the non-exhaustion of local remedies would create a bar to any proceedings on the merits, unless and until (if that be still possible) the bar is removed by due exhaustion of those remedies. In other words, there may *be* an international wrong (e.g. owing to the character of the legislation), but an international tribunal is precluded from considering whether there is or not until the opportunity reserved to States by international law to put matters right through the action of their own courts (e.g. by an interpretation of the legislation that conforms to international law) has been duly afforded in the given case, by means of the exhaustion of all available processes in the courts concerned. It was in this sense that Lauterpacht, referring to an interpretation of Norwegian law acted upon by the Norwegian authorities, allegedly contrary to international law but against which an appeal to the Norwegian courts would have been possible, said (*ibid.*):

'If the courts held that that interpretation was correct, then the road to international proceedings would no longer be blocked by the objection based on the failure to exhaust local remedies.'

This situation may be contrasted with that in which the action of the judiciary not merely confirms or fails to remedy an *antecedent* breach (or alleged breach) of international law, but is itself constitutive of the wrong—

i.e. where the breach arises directly out of the judicial act itself and would not otherwise exist; for instance where there is a denial of justice as above described. In such a case, according to well-established principles, no international wrong arises at all unless either the highest courts of appeal of the country concerned fail to reverse the decision of a lower court constituting a denial of justice, or themselves independently perpetrate such a denial. If these means of recourse are not resorted to therefore, there can, in the final analysis, be no breach of international law. Consequently, a plea of non-exhaustion in such cases is essentially a contention that the defendant State has committed no such breach, and is legally blameless: it is essentially a preliminary objection on the merits, not going to jurisdiction or competence.

(6) *Limitation to the local remedies rule: no obligation to exhaust local remedies that are not at least potentially effective*

(a) *Statement of the problem.* It has for long been accepted that the local remedies rule only applies if means of recourse under the local law not merely exist, but also appear to be such as would be capable of affording a remedy, if the claimant's case is good in law—in short the remedy must be, potentially, an 'effective' one. In the *Norwegian Loans* case (*I.C.J. Reports*, 1957, p. 39), Lauterpacht said:

'... the requirement of exhaustion of local remedies is not a purely technical or rigid rule. It is a rule which international tribunals have applied with a considerable degree of elasticity. In particular, they have refused to act on it in cases in which there are, in fact, no effective remedies available owing to the law of the State concerned or the conditions prevailing in it.'

Thus to take the last few words, it has been suggested that in a dispute between the government of a State and a foreigner, in a country where the judiciary is notoriously under the influence of the executive, appeal to the courts, though possible, would be futile *a priori*, and that in consequence no effective remedy exists.¹ Nevertheless, in many cases it may be a matter of no small difficulty, in the face of a theoretically possible means of recourse, to determine whether such means is ineffective in the sense necessary to displace the local remedies rule for the purposes of an international claim. Will it, for instance, suffice that, although the recourse *might* succeed, it is highly unlikely to do so in fact? It has even been seriously urged in international proceedings² that because a claim is almost certainly unmeritorious

¹ Even so, such a plea is unlikely to succeed in practice except in proceedings taken long after the event and relating to a former admitted period of general disorder and misrule in the defendant State subsequently brought to an end by the act of the State itself. It is in these kinds of circumstances that such a plea has succeeded before claims commissions.

² *Ambatielos* case (*Greece v. The United Kingdom*), third phase—see n. 1 on p. 57 above. Some

under the local law (whatever its merits internationally), the claimant is thereby absolved from exercising a right of appeal given him by the local law against a decision of a lower court adverse to his claim. To regard such cases as covered by the exception of ineffectiveness would go far to nullify the whole local remedies rule in practice; and it has to be insisted on that a remedy is always an effective one for the purposes of this rule if, provided the claimant is *right*, it can and will afford him due relief or compensation. A remedy cannot be *ineffective* merely because, if the claimant is in the wrong, it will not be *obtainable*.

Difficulties of this type were well exemplified in the *Norwegian Loans* case. The argument of the French Government was that, as the Norwegian courts were bound to apply Norwegian legislation, and as it was this very legislation which deprived the French bondholders of their alleged right to payment at gold value rates, recourse to the Norwegian courts would be futile, since the latter would not be in a position to afford any effective remedy. Lauterpacht, while not sharing this view, indicated that he felt a good deal of sympathy for it. The 'position of the French Government', he said (*loc. cit.*), was 'not altogether without merit', and he added (*ibid.*) that he could 'appreciate the contention of the French Government that there are no effective remedies to be exhausted' even if he must hold that 'however contingent and theoretical these remedies may be, an attempt ought to have been made to exhaust them'.

(b) *The test of 'reasonable possibility'*. Lauterpacht in fact went pretty far in this case in the direction of holding that wherever a *possible* remedy exists, recourse must be had to it, even if this is in fact highly unlikely to be successful; and he in effect therefore endorsed the view that the question of the probability or otherwise of success is quite different in principle from the question of effectiveness, and that to substitute the one test for the other, as the criterion for displacing the local remedies rule, would be incorrect, and would also drastically alter the incidence of this rule. After referring to the grounds on which it might well be doubted whether the Norwegian courts could afford any effective remedy he continued (*ibid.*):

'However these doubts do not seem strong enough to render inoperative the requirement of previous exhaustion of local remedies. The legal position on the subject cannot be regarded as so abundantly clear as to rule out as a matter of reasonable possibility an effective remedy before the Norwegian courts.'

Here Lauterpacht propounded the criterion of there being a 'reasonable possibility' that a remedy would be afforded, as being the test of effectiveness—or in other words he suggested that no means of recourse can be regarded as futile from the effectiveness standpoint unless there does not

material on the point can be found in the pleadings in the second phase before the International Court.

appear to be even a reasonable possibility that it will afford an effective remedy. This test is acceptable provided it is borne in mind that what there must be a reasonable possibility of is the *existence* of a possibly effective remedy, and that the mere fact that there is no reasonable possibility of the claimant *obtaining* that remedy, because his case is legally unmeritorious, does not constitute the type of absence of reasonable possibility which will displace the local remedies rule.

(c) *The burden of proof.* Lauterpacht next considered the question of the distribution of the burden of proof in cases where non-exhaustion of local remedies was alleged, and it was pleaded in reply that there were no effective remedies to be exhausted. While deprecating too hard and fast an attitude on the subject, he propounded (*ibid.*) the following, as being right in principle:

‘(1) As a rule, it is for the plaintiff State to prove that there are no effective remedies to which recourse can be had; (2) no such proof is required if there exists legislation which on the face of it deprives the private claimants of a remedy; (3) in that case it is for the defendant State to show that notwithstanding the apparent absence of a remedy, its existence can nevertheless reasonably be assumed; (4) the degree of burden of proof thus to be adduced ought not to be so stringent as to render the proof unduly exacting.’¹

It is clear from the sentence immediately following this passage that in (4) Lauterpacht was referring to the case mentioned in (3). In this passage, therefore, he may be taken as having lent his authority to the following three propositions (*inter alia*) in cases where ‘ineffectiveness’ is alleged:

- (i) Where there exists legislation ostensibly ruling out any remedy (or the particular remedy relied on), a *prima facie* presumption arises that there is no such remedy.
- (ii) This presumption may be displaced by evidence that notwithstanding the legislation, there were means of recourse which, if utilized, could have proved effective.
- (iii) Comparatively little evidence may suffice to establish this last point.

Lauterpacht went on to say, in a rather far-reaching application of the third of these propositions—his (4)—that both in the written and the oral proceedings, the Norwegian Government had ‘attempted to adduce such

¹ In this passage Lauterpacht, of course, assumed the existence of an initial plea of non-exhaustion. It would seem that, in putting forward such a plea, the onus lies on the defendant State simultaneously to indicate what were the remedies it contends were available but were not resorted to. If the plaintiff State, while not denying the existence of the remedies or the fact of non-recourse to them (either or both of which are also possible replies), answers that there was no obligation to have recourse to the remedies in question because they were or would have proved ineffective, then the distribution of the remainder of the burden of proof would be as stated by Lauterpacht.

proof'; and that 'whatever may be its cogency [i.e. even if its cogency may not be very great], it must be regarded as sufficient for the purpose'.

(d) *What suffices to establish the existence of a potential remedy?* Thereafter Lauterpacht addressed himself to the grounds on which, despite the existence of this Norwegian legislation, he considered that the possibility of an effective remedy in the Norwegian courts could be ruled out. In the first place he thought (*ibid.*, p. 70) that in matters of currency and international loans, the decisions of the courts of various countries—'including those of Norway'—had not 'been characterized by such a pronounced degree of uniformity as to permit a forecast with full assurance, of the result of an action in the Norwegian courts'.¹ He then briefly reviewed international practice, and pointed out (*inter alia*), with regard to the existence of legislation, that there were cases in which courts had nevertheless 'acted on the view that while the operation of the gold clause is subject to the law of the State concerned, it is so only within the limits of public policy'. He therefore concluded (*ibid.*) that this being so,

'... there may be no sufficient reason for drawing final conclusions from the alleged previous practice of the Norwegian courts and for asserting that it has been conclusively proven that there is in this case no remedy available under Norwegian law. It is possible—however unlikely in the view of the French Government that possibility may be—that the Norwegian courts may hold that the bonds embodied a true gold clause and that, having regard to international law or the constitutional law of Norway, the [*sc.* Norwegian] law of 1923 cannot be applied, or that it must be applied so as not to injure the bondholders.'

In this passage Lauterpacht relied heavily on the test of the potential existence of an effective remedy, and stamped equally hard on any test based on the unlikelihood of its being afforded *in the given case*. Only if rejection could be 'forecast with full assurance' would the local remedies rule be displaced.²

Another ground on which Lauterpacht thought that the possibility of remedial action through the Norwegian courts could not be ruled out was the fact that the Norwegian courts might elect to apply international law, and in so doing might find in favour of the bondholders. He could not, he said (pp. 40–41), 'consider it as a certainty that, assuming that the Norwegian legislation on the subject is contrary to international law in so far as it affects aliens, no remedy at all is possible under Norwegian law', because, although the Norwegian Government had admitted that 'in no case can a Norwegian court overrule Norwegian legislation on the ground that it is contrary to international law', that Government had also 'asserted that it is possible that a Norwegian court may consider international law to

¹ Here yet another form of the same basic test seems to be propounded.

² Even this would not suffice where the certainty of rejection existed only because of the manifest lack of merits of the claim.

form part of the law of the Kingdom to the extent that it ought, if possible, to interpret the Norwegian legislation in question so as not to impute to it the intention or the effect of violating international law'. Again, it seemed to be 'a fact that in certain matters Norwegian courts have the power to review the acts of the legislature, in particular from the point of view of their conformity with the constitution'. He concluded therefore (p. 41):

'These possibilities may be remote. They are not so absolutely remote as to deserve to be ruled out altogether.'

Here again a position strongly assertive of the applicability in general of the local remedies rule was taken up. Only if the possibility of a remedy being afforded was 'so absolutely remote as to deserve to be ruled out altogether' would that rule cease to be applicable. It is clear that this attitude was not due solely to Lauterpacht's agreement (though he evidently did agree) with the reason usually, and rightly, given for the local remedies rule—namely that a State must be afforded the opportunity to do right, or remedy wrong, in its own way, or through the action of its own courts, before it is held actionable in international proceedings (and indeed there may not even, in the final analysis, be any breach of international law at all until this has been done). It was also because of his sense of what (to use a well-known American expression) was required by way of 'due process of law', and the orderly conduct of international claims. This is a legitimate inference from the following passage in which he stated his final conclusion on the whole matter (p. 41), and also by implication, an important part of his legal philosophy:

'No decisive importance can be attached to the [*sc.* French] view that, seeing that the Norwegian Government repeatedly reiterated it was prevented by the Norwegian law to effect payment in gold, the French bondholders were entitled to assume that they have no remedy under Norwegian law. The Norwegian Government, being an interested party, was not for this purpose an authorised interpreter of Norwegian law. It was for the bondholders, by bringing an action before the Norwegian courts, to attempt to show that the Norwegian Government was mistaken in its interpretation of Norwegian law. If the courts held that that interpretation was correct, then the road to international proceedings would no longer be blocked by the objection based on the failure to exhaust local remedies. I must therefore, although with some hesitation, consider that objection well founded.'

The words 'although with some hesitation' at the end of this passage would seem to indicate awareness on Lauterpacht's part that the general line he had taken went about as far as it could safely go in the direction of insisting on the exhaustion of local remedies even where these were of dubious effectiveness—in fact in all cases where the bare possibility of their effectiveness could not positively be ruled out. Some may think he thereby carried

the matter a shade too far; but if there was a fault, it was a fault on the right side, and there is no question of the cogency of his view. At the least he greatly clarified the issues involved in this rather difficult subject.

§ 11. PARTICULAR POINTS OF INTERNATIONAL LAW:

(2) BREACHES OF STATE CONTRACTS ENTERED INTO WITH FOREIGNERS

It will be noticed that it is implicit in the passages cited under the preceding head that an alleged breach by a government of a contract with a foreigner is *prima facie* a matter that raises issues under international law, and is therefore in principle a matter of international jurisdiction. However, in view of his finding on the jurisdictional aspects of the *Norwegian Loans* case, Lauterpacht was not called upon to go into the substantive question of whether the alleged breach of contract would in fact have involved a violation of international law. Therefore it would be wrong to attribute to him the view that if there is in fact a breach by a State of a contract between itself and a foreign national or corporate entity, a breach of international law is thereby *ipso facto* constituted, even in the absence of any denial of justice such as would result if, for instance, a right of action were not afforded to the foreigner in the local courts, or if, such a right being afforded, the decision were given against him on manifestly dishonest grounds.

It is clear that, *failing any denial of justice in the courts*, no breach of international law can arise from the mere breach of a contract between an individual *national* (or national entity) of the country concerned and a foreigner—or from a decision given in such a case against the foreigner (unless of course it is clearly motivated by xenophobic considerations—in which event it constitutes a denial of justice). It may be slightly less obvious that there is no breach of international law arising from the breach of contract *per se*, where the contract is between the local *government* and a foreigner, and where a breach on the part of the government is alleged; but, to cite from the United Kingdom counter-case in the third phase of the *Ambatielos* case,¹ paragraph 269, 'It is generally accepted that, so long as it affords remedies in its Courts, a State is only directly responsible, on the international plane, for acts involving breaches of contract, where the breach is not a simple breach . . . but involves an obviously arbitrary or tortious element, e.g. a confiscatory breach of contract—where the true basis of the international claim is the confiscation, rather than the breach *per se*.' Thus Hyde (*International Law*, 1st ed., vol. 1, p. 549), referring to the practice of the United States, says that 'a breach of contract must

¹ See p. 57, n. 1, above.

HERSCH LAUTERPACHT—THE SCHOLAR AS JUDGE. I 65
constitute also a tort in order to be regarded as internationally illegal conduct'; and Eagleton (*The Responsibility of States in International Law*, p. 164) citing Hyde, adds: 'In these cases the basis for the claim is to be found in the fact that the circumstances accompanying the breach of contract constitute in themselves internationally illegal conduct.'

It may well be that had the Court found itself competent in the *Norwegian Loans* case, and had it gone on to determine the merits, Lauterpacht would have considered that a failure by a government to honour a gold clause in a contract with a foreigner involved a sufficiently tortious element to bring the case within the above-mentioned principle. But this cannot be assumed, and the matter seems sufficiently important and controversial to warrant this *caveat* against reading too much into his remarks on what was, as it then stood before him, a purely jurisdictional issue.

§ 12. PARTICULAR POINTS OF INTERNATIONAL LAW:

(3) THE *EXCEPTIO ORDINIS PUBLICI*

Although this matter is of direct importance mainly with reference to treaties, it involves an issue of sufficient general interest to warrant treatment in this part of the present study. Moreover, it was regarded by Lauterpacht himself as involving 'a general principle of law' (see below).

It has already been noticed under § 2 above that Lauterpacht disagreed with the view taken by the Court in the *Guardianship of Infants* case that no infraction of the Swedish-Netherlands Convention of 1902 had been committed by Sweden, because the Swedish acts complained of took place in a different field from that covered by the Convention, and related to a different institution from that of guardianship. He nevertheless agreed with the Court that Sweden had not violated the Convention; but he did so on the ground that Sweden was entitled to regard this matter as coming within the sphere of Swedish *ordre public*, and was also entitled to regard the Convention of 1902 as being subject to an implied exception in respect of action, taken in good faith, on a basis that could legitimately be regarded as relating to *ordre public*. The Court, on the other hand, in view of the nature of its finding on the direct treaty issue, considered it unnecessary to go into the question of *ordre public*, although (see p. 21 above) that matter had been put in the forefront of the arguments and submissions of both parties.

(1) *The exception of ordre public is a general principle of law in the field of private international law*

Lauterpacht held (*I.C.J. Reports*, 1958, p. 92) that in the sphere of private international law, the exception of *ordre public* as a ground for the

exclusion of the application of foreign law in any given case was generally, even universally, recognized. The reasons for this have already been noticed in another context (see § 7 above). The manner and extent of the application of this exception might vary in different countries, but on the whole with very similar results—

‘... so much so that the recognition of ... *ordre public* must be regarded as a general principle of law in the field of private international law.’

If that was so,

‘... then it may not improperly be considered to be a general principle of law in the sense of Article 38 of the Statute of the Court.’

(2) *The general content of the action of ordre public*

According to Lauterpacht’s statement of the matter (*ibid.*, p. 90), the notion of *ordre public* was ‘generally used in two meanings’ as follows:

‘It is either applied as referring to specific spheres of the law, such as territorial laws, criminal laws, police laws, laws relating to national welfare, health and security, and the like; from this point of view, protective upbringing clearly comes within the notion of *ordre public*. Secondly, it is resorted to as embracing, more generally, fundamental national conceptions of law, decency and morality. From this point of view, too, the protection of the interests of the minor through measures such as protective upbringing falls naturally within the notion of *ordre public*.’

(3) *Determination of the content of the concept of ordre public and of the propriety of its application in any particular case*

(a) *The question of content.* Although it must be for each country to determine for itself in the first place what matters and notions it regards as coming within the sphere of its *ordre public*, and to apply this concept in any particular case through its courts, Lauterpacht rejected the view that either of these matters appertained in any final sense exclusively to the national sphere, if international rights were involved. He said (*ibid.*) that clearly, ‘it is not the Swedish notion of *ordre public* which can provide the exclusive standard in this connexion’. On the contrary:

‘... the notion of *ordre public* ... being a general legal conception, its content must be determined in the same way as that of any other general principle of law in the sense of Article 38 of the Statute, namely by reference to the practice and experience of the municipal law of civilised nations in that field.’

Elsewhere (*ibid.*, p. 98), Lauterpacht remarked that both parties were in agreement that the Court was competent to decide whether the Swedish law on the protective upbringing of children came within the sphere of *ordre public*, and had been properly invoked for that purpose. In particular, Sweden did not deny ‘that the [*sc.* International] Court is competent to

determine whether, in principle' this law 'belongs to the category of *ordre public*'.

(b) *Propriety of the particular application of ordre public.* On the other hand (ibid., p. 99), Sweden did deny the competence of the Court 'to examine the grounds on which, by reference to the Law of Protective Upbringing, the Swedish Authorities decided to decree and maintain the measure which they had taken'. This view was rejected by Lauterpacht, who said (ibid.) that he was unable to 'accept the . . . view that the Court, not being a court of appeal, is not entitled to examine that aspect of the question'. Suppose, he asked,

'the Swedish Authorities had decided to apply the Law . . . to a child of Dutch nationality, born in Holland and speaking Dutch only, and who had been resident in Sweden for only one month. Would this Court be precluded from taking these facts into consideration?'

Recourse to *ordre public* he thought, 'especially if it was not expressly authorised by the Convention', was 'in the nature of an exception'. It was 'a permissible exception'. But it was 'an exception which must be justified with some particularity'.

(4) *Ordre public and treaties*

(a) *The concept of ordre public is applicable equally to treaty relations in the sphere of private international law.* The above-mentioned reference to the case where recourse to the concept of *ordre public* was not 'expressly authorised' by the Convention raises what was for Lauterpacht one of the principal issues involved, namely the application of the principle of *ordre public* in the field of treaty obligation, or in regard to any matter the subject of such an obligation. Could it be said that, whereas the notion of *ordre public* was a sufficiently recognized general principle of law to be brought automatically into play in the normal relations between States in the field of private international law, this did not apply where their treaty relations were concerned, unless the treaty expressly so provided? Lauterpacht rejected that view and thought that, on the contrary, the general recognition of the concept (and in this particular case its recognition 'both in Sweden and Holland') as a 'valid reason for the exclusion of foreign law', must lead to the conclusion (ibid., p. 93) that

' . . . the fact that a particular subject of private international law is covered by a convention does not, in the absence of express prohibition to the contrary, in itself exclude the operation of *ordre public*, even if the convention is otherwise silent in the matter. . . .'

He added an important qualification, containing echoes of views expressed

in other contexts, about the principle of *nemo iudex in re sua*,¹ when he went on to say:

‘. . . provided always that the State invoking *ordre public* is, if its decision is challenged, willing to submit to an impartial judicial or arbitral determination of the issue. The latter condition follows inevitably from the principle that a State which invokes an exception not expressly recognised by the treaty cannot claim the right to determine unilaterally whether that exception applies.’

(b) *No express reservation of ordre public necessary: the exception is implied in all treaties on private international law topics.* Lauterpacht recognized (*ibid.*, p. 94) that there was ‘some substance’ in a view which had been urged in argument before the Court, to the effect that reliance on the principle of *ordre public* was

‘inconsistent with the purpose of treaties on private international law and that *ordre public* ought to be interpreted restrictively in that sphere or refused recognition altogether. In particular, it was argued that because of its comprehensiveness and elasticity it has been the cause of uncertainty and confusion, that it has been a disturbing element in that field and, more emphatically, that it has been destructive of private international law.’

But these considerations, he thought, ‘cannot in any way be decisive’. He then stated *in extenso* his reasons for attributing primary importance to the right of States to apply the concept of *ordre public* (see Extracts (B) to this section), and continued (*ibid.*, pp. 95–96):

‘The preceding considerations may also offer assistance in answering the question whether the existence of a treaty sets a limit to reliance on public policy in the sense that the latter cannot be properly invoked unless the treaty contains an express exception to that effect. That question must be answered in the negative. Obviously, the treaty may expressly, or by implication, prohibit recourse to *ordre public*. Thus it is occasionally maintained that the Hague Convention of 1902 on the Conclusion of Marriage contained such prohibitive implication by enumerating exhaustively the reasons for which the *lex fori* could disregard the impediments to marriage established by foreign law. (Yet it is significant that, in spite of the Convention, practically all parties to it refused to recognise, prior to the Second World War, the impediments established by the German Nuremberg Laws. Although Dutch Courts applied the Convention in this respect, they often found circuitous means of defeating the Nuremberg Laws in question.)

‘However, apart from an express or clearly implied prohibition, the correct principle seems to be that a convention in the sphere of private international law does not exclude reliance on *ordre public*. Nothing short of an express prohibition can rule out reliance on a firmly established principle of private international law. This seems to me to be the fairly unanimous view of writers. They include authorities of the calibre of Professors Batiffol and Niboyet. This is also the emphatic view of an author who has devoted special attention to questions of private international law in relation to treaties (Plaisant, *Les règles de conflit de lois dans les traités*, 1946, pp. 91–94). Professor Lewald, a balanced and authoritative writer to whose views I attach importance, provides no

¹ See § 8 (2) above.

clear exception to that virtual unanimity. In 1928, writing in the *Revue de droit international privé* (pp. 164 et seq.), he stated, though with very considerable hesitation, that, *a priori*, if the treaty is silent on the question of *ordre public*, the latter cannot be invoked. In 1930, when writing in the *Répertoire de droit international* (vol. 7, p. 308), he expressed a different view, namely, that in such cases the answer to the question depends on the interpretation of a particular treaty and that it is impossible to give an answer *a priori*. There is little judicial practice directly applicable to this matter.'

The effect of this view is that the *exceptio ordinis publici* ranks as an implied term of all treaties on private international law subjects, unless expressly or by the clearest inference excluded in the particular case.

(c) *Limitations on the application of the principle of ordre public to treaties.* The application of *ordre public* in the sphere of private international law treaty relationships has certain very definite limitations or qualifications:

(i) *Not applicable to any but treaties on private international law topics.* It is, of course, tautologous to say that a principle, the sphere of operation of which is that of private international law, has no application in other fields, and in particular no application in the field of public international law relations. Yet it may not be entirely supererogatory, *ex abundanti cautela*, to register that this is implicit in Lauterpacht's whole discussion of the matter—as indeed in the whole circumstances of the *Guardianship of Infants* case. The application of any such principle in the *public* international law field could hardly fail to be destructive of the obligatory force of the great majority of public international treaties and conventions.

(ii) *Limitations on the application of the concept even within the private international law treaty field.* Even within the private international law field, Lauterpacht recognized that 'the circumstances that the parties are bound by *treaty* [writer's italics] in relation to a particular subject of private international law, sets a limit to the application of *ordre public*', and that it does so in three respects, which he stated as follows (*ibid.*, p. 93):

'In the first instance, the existence of the treaty imposes upon municipal courts an obligation of restraint in invoking *ordre public*—a restraint additional to that which they impose upon themselves in matters of private international law generally. This is admitted by both Parties. In fact, it is one of the objects of a treaty bearing upon private international law to set some further limit to reliance upon *ordre public*.

'Secondly, the existence of a treaty limits the discretion of national courts in determining whether a particular subject is within the domain of *ordre public*; it limits it in the sense that in case of a dispute, and provided that an international tribunal is endowed with the requisite jurisdiction, it is for that tribunal to determine the matter. This too, is in substance admitted by both Parties.

'Thirdly—a view contended for by Holland but denied by Sweden—in the case of a dispute as to the manner in which the national authority has applied the exception of *ordre public*, that question is subject to review and determination by an international tribunal, if otherwise competent in the matter. That aspect of the question is examined later in this Opinion.'

The last of these considerations has already been noticed. It was further elaborated by Lauterpacht in a later passage of great significance, in which he said (*ibid.*, p. 100) that

‘When there is no treaty binding upon a State, it has very considerable—although not unlimited—discretion in applying its system of private international law in relation to *ordre public*. But when that State is bound by a treaty in relation to a particular subject-matter, it can invoke public order only if, in case its action is challenged, it is prepared to submit the legality of its action to impartial decision. It is that jurisdiction which removes the notion of and recourse to *ordre public* from the orbit of uncertainty, pure discretion and arbitrariness and which endows the treaty with the character of an effective legal obligation. It is that subjection to judicial or arbitral determination, as the very condition of legitimate reliance on *ordre public* in cases not expressly provided by the treaty, which saves *ordre public* in such cases from the reproach of being a cover for a unilateral repudiation of the treaty and which gives it the character of an attempt to secure a just and reasonable interpretation of treaty obligations.’

These various pronouncements (and they are only excerpts from what is available in Lauterpacht’s Judgment in the *Guardianship of Infants* case) amount almost to a codification of the public international law aspect of a topic of obvious importance, which has never previously, so far as the present writer is aware, been subjected to any comparable judicial analysis and elucidation in the international law field, though attention has, of course, frequently been drawn to the difficulties of the concept of *ordre public* in the private international law sphere itself.¹ This first instalment of a study of Lauterpacht’s work as an international Judge may fittingly close on that note.

EXTRACTS (B)

ORDRE PUBLIC

(see page 68 of the Article)

Extracts from Sir Hersch Lauterpacht’s Separate Opinion in the *Guardianship of Infants* case (*I.C.J. Reports*, 1958, at pp. 94–95):

‘Admittedly, the notion of *ordre public*—like that of public policy—is variable, indefinite and occasionally productive of arbitrariness and abuse. It has been compared in this respect, not without some justification, with the vagueness of the law of nature. Admittedly also, it has often been the instrument or the expression of national exclusiveness and prejudice impatient of the application of foreign law. Yet these objections, justified as they are, do not alter the fact that the principle permitting reliance on *ordre public* in the sphere of private international law has become—and that it is—a general principle of law of most, if not all, civilized States. More than that: It is, on its own merits, part and parcel of the entire doctrine and practice of private international law almost from its very inception; the two are inseparable, not only as a matter of history but also of necessity; they have grown together in a mutual interaction and compromise.

¹ See, for instance, Cheshire, *Private International Law*, 4th ed., pp. 35–36.

The purpose of private international law is to make possible the application, within the territory of the State, of the law of foreign States. This is an object dictated by considerations of justice, convenience, the necessities of international intercourse between individuals and indeed, as has occasionally been said, by an enlightened conception of public policy itself. But there is an obvious element of simplification in the view that the law of a State should be deemed to have consented or that it should reasonably be expected to consent in advance to the application of foreign law without any limitations, in any circumstances whatsoever, without a safety valve, without a residuum of contingencies in which, because of the very nature of its structure and the fundamental legal, moral and political conceptions which underlie it, it should be able to decline to apply foreign law.

‘Within the State, the judicial use of public policy¹—of *ordre public*—has often been exposed to criticism. But it is seldom, if ever, suggested that it is not an indispensable instrument of the interpretation, application and development of the law. If that is so in relation to the national law of the State which may be changed by ordinary legislative processes, it is particularly so in relation to foreign law over which the State has no control and which, in certain circumstances, its courts may find it inconceivable to apply. History—modern history—has occasionally produced examples of legislation manifesting eruptions of malevolent injustice, or worse, to which courts of foreign countries may find it utterly impossible to give effect and with regard to which the right to denounce the treaty may not provide a timely or practicable remedy.

‘It is that residuum of discretion, it is that safety valve, which has made private international law possible at all, and which, if kept within proper limits, is one of the principal guarantees of its continued existence and development. It is significant that an important part of the contribution of the most illustrious exponents of private international law—such as Story, Savigny and Pillet—lay in their effort to formulate the notion of *ordre public* and the limits, often wide and general, of its application. *Ordre public* is, and ought increasingly to be, subject to reasonable limitations in accordance with the main purpose of private international law. But the problem cannot be solved by the device of shelving it. It can be alleviated by the existence of international remedies of judicial control and review whenever there exists the requisite jurisdiction of an international tribunal. The present case afforded an opportunity for acting in that way.’

¹ The use of the term ‘public policy’ as an equivalent for *ordre public* would be criticized by many English lawyers. The difficulty of finding a completely satisfactory equivalent has led to the frequent adoption of the French term for English purposes also.

THE INTERPRETATION OF PLURILINGUAL TREATIES BY INTERNATIONAL COURTS AND TRIBUNALS*

By JEAN HARDY, M.A.

Docteur en Droit (Paris)

INTRODUCTION

FOR many centuries Latin was the only written language of Western Europe; as the language of the Empire, the Church and the Law, it survived the Middle Ages and remained the principal diplomatic language until the beginning of the eighteenth century. But as the great Western States came into being, the supremacy of Latin was exposed to the growing challenge of national languages, principally of French. In the seventeenth century, as a result of the pre-eminence of French letters and the success of the armies of Louis XIV, the French language gained such prestige and widespread acceptance that it was adopted by the courts of Europe and diplomats came to rely on it at international conferences and in treaties. In the eighteenth century, French succeeded Latin as the principal diplomatic language, but the very fact that it was a national language always prevented it from attaining the same degree of universality. Nevertheless, the principal multilateral instruments of the nineteenth century and the beginning of the twentieth century were drawn up in French. The decline of French as a diplomatic language began after the First World War and gained momentum after the Second. The most important peace treaty of 1919-20, namely the Treaty of Versailles, was drawn up in French and English; but of the five peace treaties concluded in Paris on 10 February 1947, only the Treaty of Peace with Italy contained, besides the authentic English and Russian texts, an authentic text in French. In the League of Nations, English had attained parity with French. In the United Nations, French had to struggle to obtain parity with English; and those two languages were forced to share their position as official languages with Spanish, Russian and Chinese. Since 1945, most multilateral instruments of universal purport are drawn up, like the Charter of the United Nations, in English, French, Spanish, Russian and Chinese. Thus it was the decline of Latin and then of French as diplomatic languages—a decline in itself brought on by ‘linguistic nationalism’—that gave rise to the practice of treaties being drafted in plurilingual form.

This practice has on occasions had very serious consequences in the

* © Dr. Jean Hardy, 1962.

most varied fields. Thus, for example, a discrepancy between the Italian and Amharic texts of Article 17 of the Treaty of Ucciali of 2 May 1889 triggered off the diplomatic incidents which provoked the Italian-Ethiopian War of 1896.¹ Again, the uncertainty which long beclouded the question whether the Permanent Court of International Justice was bound to accede to requests for an advisory opinion was largely due to a divergence between the French and English texts of Article 14 of the Covenant of the League of Nations.² It is in the interpretation of treaties, however, that the practice of plurilingual diplomatic expression raises the most complex problems. These have hardly been considered by the learned authorities, although in 1926, in the course of the work of the League of Nations Committee of Experts for the Progressive Codification of International Law on the law of treaties, Mr. Rundstein drew the Committee's attention to the difficulties of interpretation in cases in which a convention is drawn up in more languages than one,³ and although more recently the matter has been brought to the attention of the *Institut de Droit International*.⁴ When confronted with such a convention, what attitude does the international judge adopt if the texts do not agree? In which text does he seek that common intention of the parties which—as must be assumed for the limited purposes of this paper—it is the primary objective of interpretation to ascertain? This is the principal problem which the present study seeks to resolve. Rather than apply deductive processes of abstract logic, the decisions of international courts and tribunals were scrutinized in order to determine whether in this matter there existed, if not legal rules, at least some relevant

¹ See Rousseau, *Principes généraux du droit international public*, vol. 1, pp. 167–8.

² The French text of Article 14 of the Covenant provides that the Court *donnera* advisory opinions at the request of the Council or the Assembly, while the English text states that 'the Court may . . . give an advisory opinion . . .'. In a memorandum presented to the Court on 18 February 1922 during the elaboration of the Rules of Court, Judge Moore pointed out that, by reason of the extra-judicial character of the advisory function, it did not seem reasonable to hold that the obligation to perform the same could be deduced from two contradictory texts both of which were equally official (*P.C.I.J.*, Series D, No. 2, pp. 383–98 and 512–13). On Judge Moore's proposal, the Court left the question open (*ibid.*, pp. 98–99), which was tantamount, as the Court's later practice was to confirm, to admitting that Article 14 of the Covenant was purely permissive (see the Individual Opinion of Judge Anzilotti in the case of *Certain Danzig Legislative Decrees*, *P.C.I.J.*, Series A/B, No. 65, pp. 60–61 and the Dissenting Opinion of Judge Zoričić in the case concerning the *Admission of a State to the United Nations*, *I.C.J. Reports*, 1948, pp. 94–95). In Article 65 of the Statute of the International Court of Justice, which deals with advisory opinions, the French text was expressly adjusted to the English. The superiority of the English text of Article 14 of the Covenant is also clear from the second sentence, where it is stated that the Permanent Court of International Justice shall be competent to hear and determine 'any dispute of an international character which the parties thereto submit to it' (*tous différends d'un caractère international que les Parties lui soumettront*). In the French text, the word *Parties* may refer either to the States parties to the dispute or to the States parties to the Treaty, while in the English version the word 'thereto' eliminates all ambiguity.

³ League of Nations, Doc. C.47. M.24.1926.V, p. 10.

⁴ See in particular the comments of Alfred Verdross on the report on the interpretation of treaties prepared by Sir Hersch Lauterpacht for the Bath session (*Annuaire de l'Institut de Droit International* (1950), vol. 1, p. 456).

methods of interpretation—which might be regarded as technical rules—recognized as proper. The inquiry ranged in principle over all the decisions of international courts and tribunals called upon to apply plurilingual treaties, with a few decisions of national courts invoked as supporting authority.

International treaties may comprise texts of three principal types, of unequal authority: authentic texts, official texts and official translations. Authentic texts are those which are deemed to prevail; official texts are those which the contracting parties have signed but which are not deemed authoritative; and official translations may be prepared by Governments or by international bodies. There may thus be a discrepancy between texts of either equal or unequal authority. The first chapter will deal with divergences between texts of equal status; the second will analyse differences between texts of unequal authority; and the third will be devoted to a few related problems which the interpretation of plurilingual treaties poses in the practice of international courts and tribunals.

CHAPTER I

DIVERGENCES BETWEEN TEXTS OF EQUAL AUTHORITY

Conflicts between texts of equal authority are, in the final analysis, always conflicts between texts declared equally authentic. Conflicts between texts which carry lesser force, i.e. official texts or official translations, are of no practical interest: the existence of an authentic text or texts necessarily relegates them into the background and they are of no concern to the courts.

In the absence of a specific clause, the equal authenticity of texts derives from the mere fact that the instrument has been concluded in this and that language.¹ In a report of 22 September 1836, John Dodson, K.C., expressed the opinion that His Britannic Majesty's Government would not be justified in adhering to the English rather than the Spanish version of a treaty concluded with Mexico and drawn up in both those languages.² And, as will emerge in the course of this study, the decisions of international tribunals confirm this opinion. Modern diplomatic practice, however, increasingly tends to call for the insertion in plurilingual treaties of a clause regarding

¹ In the case of instruments concluded under the auspices of an international organization, it may happen that every text drawn up in an official language of the competent organ is deemed authentic. Thus in the case of agreements approved by the General Assembly of the United Nations, the Secretary-General considers that, in the absence of *ad hoc* provisions in the agreement or in the General Assembly resolution, the Chinese, English, French, Russian and Spanish texts are in principle equally authentic (*Summary of the practice of the Secretary-General as depositary of multilateral agreements*, U.N. Doc. ST/LEG/7, p. 8).

² McNair, *The Law of Treaties*, p. 60.

the authenticity of texts. This clause, which normally appears among the final clauses but which is also sometimes found in the body of the treaty,¹ or even in the preamble,² may assume any one of a multitude of forms. For instance, the régime thereby created between the contracting parties need not be uniform. Thus the Treaty of Peace of Brest Litovsk of 9 February 1918 between Germany, Austria-Hungary, Bulgaria and Turkey of the one part, and the Ukrainian Republic of the other part, was drawn up in German, Hungarian, Bulgarian, Turkish and Ukrainian. The German and Ukrainian texts were authoritative as between Germany and the Ukraine; the German, Hungarian and Ukrainian texts as between Austria-Hungary and the Ukraine; the Bulgarian and Ukrainian texts as between Bulgaria and the Ukraine; and the Turkish and Ukrainian texts as between Turkey and the Ukraine (Article X).³

Whether or not a treaty contains a special clause, discrepancies may exist between the various authentic texts. And this raises the question of the attitude which the judge is likely to adopt. Exceptionally, the authors of the instrument may have made provision for such a contingency. Thus the Extradition Convention signed at Florence on 27 February 1869 between Austria-Hungary and Italy is followed by a declaration in French where it is stated:

‘Que les deux textes de la Convention, savoir le texte allemand et le texte italien, doivent être considérés comme également authentiques, et que s’il pouvait se trouver une divergence entre ces deux textes, de même que s’il surgissait un doute sur l’interprétation d’un passage quelconque, l’on suivra l’interprétation la plus favorable à l’extradition du prévenu.’⁴

In the normal course of events, however, it is up to the judge himself to solve the problem. In the sections below, the different processes followed in that regard by the courts, and more particularly by the international

¹ See, for example, Article 3 of the Treaty of Friendship, Commerce and Navigation concluded between France and China at Tientsin on 27 June 1858 (Martens, *N.R.G.*, vol. 17, first part, p. 4).

² See, for example, the preamble of the Agreements relating to the obligations resulting from the Treaty of Trianon, signed at Paris on 28 April 1930 (*League of Nations Treaty Series*, vol. 121, pp. 72-73).

³ Martens, *N.R.G.*, 3rd Series, vol. 10, p. 760. A similar clause appears in the Treaty of Peace signed at Brest Litovsk and at Bucharest on 3 and 7 March 1918 between Germany, Austria-Hungary, Bulgaria, Turkey and Russia, which was drawn up in German, Hungarian, Bulgarian, Turkish and Russian (Article XIII) (*ibid.*, p. 777), as well as in the Treaty of Peace of Bucharest of 7 May 1918, concluded between Germany, Austria-Hungary, Bulgaria, Turkey and Roumania (Article XXX) (*ibid.*, p. 870). See also the *procès-verbal* of signature attached to the second additional Convention on the Transport of Goods by Rail, signed at Berne on 19 September 1906, which provides that a German version annexed to the *procès-verbal* ‘aura la même valeur que le texte français en tant qu’il s’agit de transports par chemins de fer intéressant un pays où l’allemand est employé exclusivement ou à côté d’autres langues comme langue d’affaires’ (Martens, *N.R.G.*, 3rd Series, vol. 3, pp. 979-80).

⁴ *Ibid.*, 2nd Series, vol. 1, p. 344. Cf. Treaty of Extradition of 25 June 1887 between Austria-Hungary and Uruguay, Article 16 (*ibid.*, vol. 25, pp. 54-55).

courts, will each be examined in turn. As a first step, consideration must be given to a Judgment of the Permanent Court of International Justice which learned writers have often—and, it would seem, erroneously—regarded as a statement of the law or, at least, of judicial practice in the matter.

THE *MAVROMMATIS PALESTINE CONCESSIONS* CASE

The most explicit ruling of the Permanent Court of International Justice on the question of the interpretation of divergent passages in plurilingual texts is to be found in its Judgment concerning the *Mavrommatis Palestine Concessions*. Greece had instituted proceedings before the Court against Great Britain on the basis of Article 26 of the Mandate for Palestine, which conferred on the Court jurisdiction over any dispute 'relating to the interpretation or the application of the provisions of the Mandate' which might arise between the Mandatory and another Member of the League of Nations and which could not be settled by negotiation. Greece contended that, in contracting with one Rutenberg for the execution of certain works in respect of which a Greek national already held a concession, the Administration of Palestine had acted in breach of the 'international obligations' referred to in Article 11 of the Mandate, worded as follows:

English text

The Administration of Palestine shall take all necessary measures to safeguard the interests of the community in connexion with the development of the country, and, subject to any international obligations accepted by the Mandatory, shall have full power to provide for public ownership or control of any of the natural resources of the country or of the public works, services and utilities established or to be established therein. [. . .]

French text

L'Administration de la Palestine prendra toutes mesures nécessaires pour sauvegarder les intérêts de la communauté concernant le développement du pays et, sous réserve des obligations internationales acceptées par le Mandataire, elle aura pleins pouvoirs pour décider quant à la propriété ou au contrôle public de toutes les ressources naturelles du pays ou de travaux et services d'utilité publique déjà établis ou à y établir. [. . .]

Since Great Britain objected to the jurisdiction of the Court, the latter had to establish, in order to assert its competence, that the dispute indeed arose from the interpretation or the application of the provisions of the Mandate, or, in other words, that the Rutenberg concessions had in fact been granted in the exercise of powers which the Administration of Palestine enjoyed pursuant to Article 11 of the Mandate. In considering the extent of those powers the Court noted a discrepancy between the French and English versions of Article 11, both of which versions were authentic. In its analysis of the relevant passage, it held that, according to the French version, the powers attributed to the Palestine Administration might

cover every kind of decision regarding public ownership and every form of *contrôle* as regards the development of the natural resources of the country or over public works, services and utilities. The English text, however, seemed to have a more restricted meaning and contemplated only the acquisition of 'public ownership' or 'public control' over the said resources or over the said works and services. Since no question of 'public ownership' was in issue, it was the expression 'public control' that required definition. The word 'control' might have a very wide sense but, used in conjunction with the expression 'public ownership', it appeared rather to mean 'the various methods whereby the public administration may take over, or dictate the policy of, undertakings not publicly owned'. The Court ruled in favour of the English text, stating that:

'Where two versions possessing equal authority exist one of which appears to have a wider bearing than the other, it is bound to adopt the more limited interpretation which can be made to harmonise with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the Parties. In the present case this conclusion is indicated with especial force because the question concerns an instrument laying down the obligations of Great Britain in her capacity as Mandatory for Palestine and because the original draft of this instrument was probably made in English.'

All that remained for the Court to decide was whether the grant of the Rutenberg concessions had given rise to the exercise of 'public control'. That expression might cover, in a very restricted sense, only cases where the Government took over and itself directed undertakings of one kind or another; and the Rutenberg concessions could not be considered as having conferred upon the Palestine Administration 'public control', in that sense, over the services under concession. In fact that very restricted meaning of the English expression had to be rejected because it would nullify the expression *contrôle public* in the French version. 'Public control' might also indicate, in a wider sense, certain forms of action taken by the State with regard to otherwise private undertakings; it then meant measures of a special character in connexion with an economic policy consisting in subordinating private enterprise to public authority. The Court considered the circumstances in which the Rutenberg concessions had been granted, and concluded therefrom that the Palestine Administration had, in granting the same, applied the system of 'public control' as ultimately defined.¹

The first sentence of the passage cited is drawn in general terms, while the second refers to the case under consideration alone. In the first sentence, the Court applied the principle of restrictive interpretation. And there is no doubt that, as the words to be interpreted conferred certain powers

¹ *P.C.I.J.*, Series A, No. 2, pp. 15-21.

which seem wider in the French version than in the English, to extend to the beneficiary a prerogative conferred upon him by the more limited text was necessarily consistent with the intention of the parties. But how does this principle stand the test as a rule of interpretation? Would the Court have applied it if, for example, the applicant State had imputed to the Mandatory the exercise of a power comprised only within the sphere of authority defined by the wider text? In reality, by adopting the 'limited interpretation' which can be made to 'harmonise with both versions', the Court did not interpret the words concerned; it did not establish the sense which, in its view, the parties had intended to give to them, but simply stated that the act in question had at all times been one of the acts envisaged by the parties. It defined a common ground between the two versions and ruled that the act was therein comprised; but with regard to anything outside that common ground, it said nothing whatever. Moreover, when the Court spoke of the 'common intention of the parties', what parties did it have in mind? The Palestine Mandate was embodied in a resolution of the League of Nations Council. Were those 'parties', then, the States represented on the Council (which included the Mandatory), or the Council as a collective organ and the Mandatory, or the two States parties to the dispute? No answer is, or could possibly be, given, for the provision was drawn up in two versions but not by two parties (or groups of parties) whose respective languages were English and French. The Palestine Mandate is only bilingual because it was an instrument prepared under the auspices of the League of Nations. And by thus attributing each of the two texts to somewhat fictitious 'parties', the Court seems to have disregarded the fact that the mandates were *sui generis*; influenced perhaps by past arbitral decisions, it appears to have applied, in a somewhat automatic manner, a method of interpretation particularly adapted to bilateral treaties.¹

In the second sentence, the Court corroborated the conclusion at which it had just arrived. It stated, in the first place, that the question concerned 'an instrument laying down the obligations of Great Britain in her capacity as Mandatory for Palestine'. Did it mean thereby that the Mandate had to be strictly construed because it imposed obligations on Great Britain?² That would not seem to be the case, for the Mandate not only imposed duties on the Mandatory but also conferred rights upon him, and the words requiring interpretation referred explicitly to the latter. It would rather

¹ The risks inherent in this method did not escape the notice of Judge Moore, who nevertheless, in the case under consideration, also assimilated mandates to treaties for purposes of interpretation. 'Without discussing', he stated in his Dissenting Opinion, 'whether a mandate, which is in a sense a legislative act of the Council, is on the same legal footing as a treaty, I accept for the present case the rules laid down by authorities on international law for the interpretation of treaties' (ibid., p. 69).

² On the rule regarding the supremacy of the text favourable to the obligor, see below, pp. 113-14.

seem that, at that point, the Court applied the rule relied upon by Judge Moore in his Dissenting Opinion when he cited the words of Rivier: 'If there is a difference as to the sense which usage gives to the text, preference is given to that of the country which is bound.'¹ In any event, the Judgment is not clear on this point. The Court also stated that 'the original draft . . . was probably made in English'. Here, the Court did not confine itself to a partial reconstruction of the common intention of the parties by seeking *a minimis* all the elements common to the two texts. Nor was it reasoning by reference to a given set of circumstances. It attempted a genuine interpretation, for it endeavoured to reconstruct the intention of the parties *in toto*. But the attempt never went beyond the initial stage. And the fact that the Court merely touched upon the argument cannot be adequately explained by its reluctance to seek guidance in the preparatory work. In the same Judgment, it did not hesitate to rely on that work in order to show that the words 'subject to any international obligations accepted by the Mandatory', which also appear in Article 11, referred to Protocol XII of the Treaty of Lausanne;² it is true that this was not done on its own initiative ('the Court has been informed . . .'), that the survey related only to the last phase of the drafting of Article 11 and that the inference was particularly simple to confirm. In order to understand the Court's careful approach, it must be borne in mind that the drawing up of the Palestine Mandate was spread over several years and that various bodies took part in it. The Supreme Council of the Principal Allied and Associated Powers had, on 28 June 1919, appointed a Commission under the chairmanship of Lord Milner to draft standard forms of mandates A, B and C. Draft mandate A, which was to have applied to the former possessions of the Ottoman Empire, was abandoned after a difference of opinion. A new text, drawn up by experts designated by the British Government, was submitted on 7 December 1920 for the approval of the League of Nations Council and later amended when it became clear that the Treaty of Sèvres, mentioned in Article 11, would never come into force. The Council itself introduced certain changes in the draft and approved it on 22 July 1922.³ In those circumstances, the Court understandably did not, with the sole aim of corroborating its conclusions, embark *motu proprio* on research which would necessarily have been prolonged and which might have produced only uncertain results.⁴

¹ *P.C.I.J.*, Series A, No. 2, p. 70. This rule, which must not be confused with the rule referred to in the preceding note—for the text consistent with the usage of the party that is bound is not necessarily the most favourable to that party—is analogous to the rule set down by Fiore and considered below (see pp. 115–16, 'Supremacy of the text drawn up in the language of the State to which the provision under consideration refers'). ² *Ibid.*, pp. 24–26 and 30–31.

³ See Stoyanovsky, *The Mandate for Palestine* (1928), pp. 30–33 and 318–20, and Quincy Wright, *Mandates under the League of Nations* (1930), pp. 47–48 and 109–17.

⁴ Independently of the preparatory work, certain linguistic details tend to prove that the

Thus, in the second sentence of the passage cited above—notwithstanding the part of the text where the meaning is not clear—the Permanent Court set off with a genuine intention of interpreting the words in question but finally arrived only at a presumption ('... probably ...'); the method which it adopted, namely recourse to the original text, is considered in section II of this chapter. But in the first sentence, often cited by learned authors, the Court did not, despite appearances, interpret the words at all; it confined itself to proving that, whether the French or the English version was taken as a basis, the grant of the concessions to Rutenberg came within the powers therein defined. Its interpretation was in effect merely a highly logical piece of reasoning, and the assertion of certain authors that the Court endorsed 'limited interpretation' as a rule for solving discrepancies between authentic texts is accordingly erroneous.¹

original text had been the English. Thus, the fact that a technical expression ('public control') corresponds to a vague one (*contrôle public*) suggests that the second was probably a literal translation of the first; see, on this subject, the Dissenting Opinion of Judge Moore (*P.C.I.J.*, Series A, No. 2, p. 69). Furthermore, there is every reason to believe that the words *décider quant à* are only an incorrect translation of 'provide for', as stated by Judge Nyholm in his Dissenting Opinion attached to the Judgment concerning the *Readaptation of the Mavrommatis Jerusalem Concessions* (Jurisdiction) (*ibid.*, No. 11, p. 28). As is also known, the Permanent Mandates Commission, at its first session, decided to base itself on the English text for British mandates and on the French text for French and Belgian mandates (League of Nations, Permanent Mandates Commission, *Minutes of the First Session*, p. 10).

¹ The decisions of the Italian-United States Conciliation Commission established pursuant to Article 83 of the Treaty of Peace with Italy, the French, English and Russian texts of which are equally authentic (Article 90), also bear the mark of this alleged rule. In the *Bacharach* case, the Commission based itself solely on the English and French texts of the Treaty (on this point see below, pp. 144-5) in interpreting the second sub-paragraph of Article 78, 9 (*a*) which, for the purposes of the restitution which Italy was required to make to United Nations nationals, assimilates to the latter 'all individuals, corporations or associations which, under the laws in force in Italy during the war, have been treated as enemy' ('... ont été traitées comme ennemis'). The United States agent contended that, in the context, the words 'treat' and *traiter* merely meant 'to consider'. The Commission rejected that interpretation as inconsistent with the ordinary meaning of those words, and agreed with the Italian agent that the provision could only apply if the Italian authorities had taken against the person concerned a positive and concrete measure putting such person on the same footing as enemy nationals (*Collection of Decisions of the Italian-United States Conciliation Commission*, vol. 2, case No. 22, decision No. 22, p. 3). The Russian text, to which no reference was made, confirmed the United States interpretation: *rassmatrivalis kak vrazheskie*.

In the *Flegenheimer* case, the United States agent again argued in favour of that interpretation, invoking, this time, the authority of the Russian version; he also cited in support the Italian text ('... considerare come nemiche')—official but not authentic—which he considered binding on the Italian Government because it expressed unequivocally the meaning which the latter attributed to the provision in question. In its Award, the Commission rejected the argument based on the Italian text, a collective work of all the contracting parties which had themselves omitted to declare it authentic. The Commission recognized that the French, English and Russian texts were equally authentic and that it had to make an effort to conciliate them. It consulted Littré and Harrap and concluded that the words *traiter* and 'treat' could not, at least as ordinarily accepted, mean 'to consider', which was the only possible meaning to be drawn from the Russian version. The Commission solved the difficulty by the following curious reasoning: 'When the texts of an international treaty prepared in different languages cannot be exactly reconciled with one another, the Commission, according to the teachings of international law, believes that adjustment should be made on the basis of a common denominator which answers the meaning of all the texts stated to be authenticated originals by the Parties. It is universally admitted that treaties can confer rights and impose obligations on the contracting States only within the limits

This being so, it is permissible to ask whether the attempt to interpret the words in dispute was strictly necessary. It might have been sufficient for the Court, in the first place, to accept only the limited English version, to define the scope thereof, as indeed it did, and to find, as again it did, that the grant of the Rutenberg concessions had been an act of 'public control'; having thus established its jurisdiction on the basis of the English version, it could then have ruled that, *a fortiori*, it had jurisdiction under the wider French text. By thus limiting itself to finding that a measure of 'public control' was necessarily one of *contrôle public*, the Court would, it seems, have been able to declare itself competent to consider the case without being bound by a formal interpretation likely to facilitate the subsequent raising, by the Mandatory, of objections to the jurisdiction on the grounds that any given act or omission imputed to the Palestine Administration was not within the exercise of powers defined in Article 11.¹ In any event, however, the plurality of authentic texts opens to judicial reasoning certain possibilities which seemed to require pointing out and will be considered further.²

within which the intent of these States became manifest in a concordant manner. It is clear that the expression *considérés* of the Russian Treaty includes *traités* or "treated", because a person who was not a United Nations national, but who was treated as enemy by the Italian Government, must have forcibly been first considered as enemy by the aforesaid Italian Government, whereas the reverse proposition is not correct.'

After having, therefore, in fact opted in favour of the French and English texts, the Commission showed with great force that the Russian text did not correspond to the intention of the parties: the reparation measures envisaged in Part VII of the Treaty would only be justified if the interests of United Nations nationals had been genuinely injured, and a person could be 'considered' as enemy without any ensuing damage. It added that the disputed provision demanded strict interpretation because it derogated from the ordinary law of diplomatic protection. Finally, it invoked its own decisions (including the decision handed down in the *Bacharach* case) and those of the Franco-Italian Conciliation Commission (*Italian-United States Conciliation Commission*, case No. 20, decision No. 182, pp. 71-77 and 81).

The passage reproduced above shows what can be the results of the 'limited interpretation' doctrine adopted in the Judgment in the *Mavrommatis Palestine Concessions* case, when followed to the letter and invested with the authority of a rule. Conciliating all the authentic texts on the basis of their 'common denominator' is, in fact, equivalent to giving full effect to some of them—those with a limited scope—at the expense of the others. Further, the second sentence implies that each of the three texts expresses the wish of one contracting party, as if the Treaty of Peace with Italy had been a treaty concluded between three States whose respective languages were English, French and Russian. Finally, there is no quantitative relationship between the notions expressed by the words 'considered', corresponding to the Russian version, and 'treated', used in the English and French texts, and if one existed the Commission should logically—from its own point of view—have followed the Russian version. Before treating somebody as enemy, it said, the Italian Government first had to consider him as such, while the opposite was not true. It is therefore the Russian text which corresponds to the aforesaid 'common denominator'.

¹ This argument was successfully relied upon by Great Britain in the case of the *Readaptation of the Mavrommatis Jerusalem Concessions* (Jurisdiction): Judgment No. 10 of 10 October 1927 (*P.C.I.J.*, Series A, No. 11, pp. 12-13 and 14-22); in that case, the Court confirmed its doctrine of 'public control' which it had recalled in its Judgment No. 5 of 26 March 1925 (*ibid.*, Series A, No. 5, p. 27). In the opinion of Kuhn, Judgment No. 10 marked a weakening of the Court's control over the administration of the Mandate (*American Journal of International Law*, 22 (1928), pp. 383-5); see also the Dissenting Opinion of Judge Nyholm attached to that Judgment (*P.C.I.J.*, Series A, No. 11, pp. 30-31).

² See section IV of this chapter. The Judgment calls for one final comment. After having in fact opted for the English text, the Court studied the possible meanings of the expression 'public

I. CONCILIATION OF TEXTS

Words have no intrinsic significance; their meaning is that which is given to them in a given milieu at a given time. Further, each language possesses its own genius, which influences the choice of words and the arrangement of the sentence. It is therefore rarely possible to maintain, either in form or in meaning, a perfect concordance between the different texts of a plurilingual treaty. But divergent texts are not necessarily incompatible, and the case law of international tribunals shows that, when faced with divergent texts of an equal authority which the express or implicit will of the parties requires him to respect, the judge endeavours, in the first place, to conciliate them. Several methods are open to him. At times, a mere comparison of the texts suffices to reveal one or several possible meanings; on other occasions, he must also consider extrinsic elements.

A. Comparison of texts

The ways of applying this method appear to vary, in detail, depending on the cause of the discrepancy. Such a discrepancy may exist because one of the texts lends itself to several interpretations, or because one of them is obscure or vague to a point where it lends itself either to no constructions or to a virtually unlimited number.

(1) Texts open to several interpretations

When each of the texts, without being obscure, is open to several interpretations, the judge gives effect to all the texts by adopting a single interpretation to which they all lend themselves. The Mixed Commission constituted by the United States and Venezuela under the Convention of 5 December 1885 enunciated and applied this rule in the *Venezuelan Bond* cases. In order to determine the meaning of the word 'claim' (*reclamación*), it considered the various possible meanings of those words and rejected all except those which they both had in common:

'Should there appear to be a meaning in the word of one language not found in that of the other, of course it should be disregarded, and only that meaning taken which is common to both.'¹

This rule is not necessarily decisive, for the different texts may have control' and rejected one of them as incompatible with the French text. Was it logical, after having admitted that the French text was probably a translation, to use it in order to clarify the English text? Cf., on this subject, section II of this chapter, *in fine*. In his Dissenting Opinion, Lord Finlay held that the two texts of Article 11 concurred; but in connexion with a particular point, he relied on the French version in order to clarify the English (*P.C.I.J.*, Series A, No. 2, p. 44). By contrast, Judge Moore interpreted the words 'public ownership or control' solely on the basis of the English text and context, although he implied that the French version offered certain possibilities (*ibid.*, pp. 69-70).

¹ Moore, *International Arbitrations*, vol. 4, p. 3623.

several common meanings. In those circumstances, however, the case is analogous to that of a single text open to several interpretations.

By contrast, if one of the texts lends itself to several interpretations whereas the other permits only one of them, the latter must prevail. In such a case, the judge's task is simplified. He is bound by the text which admits only one construction, to the extent—obviously—that it does not contradict the other text. The most explicit statement of this rule appears in the award given by Arbitrator Beichmann in the case of *German Reparations under Article 260 of the Treaty of Versailles*.¹ That article provided that the Reparation Commission could demand that Germany acquire, for transfer to the Commission, the rights or interests which German nationals held in any public utility undertaking or any concession:

English text

... in Russia, China ... or in any territory formerly belonging to Germany or her allies, to be ceded by Germany or her allies to any Power or to be administered by a Mandatory under the present Treaty. ...

French text

... en Russie, en Chine ... ou sur un territoire qui, ayant appartenu à l'Allemagne ou à ses alliés, doit être cédé ou administré par un mandataire en vertu du présent Traité. ...

The ambiguity of the French text, where the words *en vertu du présent Traité* could refer to *cédé ou administré par un mandataire* or only to *administré par un mandataire*, gave rise to a dispute between Germany and the Reparation Commission on the point whether the provisions of Article 260 of the Treaty of Versailles applied to territories ceded under other treaties.

In his Award, the Arbitrator first ruled that the English text was clear and necessarily applied to territories ceded under other treaties, because it spoke of territories ceded by Germany or her allies and the latter were not parties to the Treaty of Versailles. He then criticized the interpretation of the French text proposed by each of the parties. The broad outline of the argument is worth recalling, for it raises certain questions which will have to be considered again at a later stage.

Interpretation of the Reparation Commission

The words *en vertu du présent Traité* referred only to the words *administré par un mandataire*, for the following reasons:

1. If they referred also to the word *cédé*, the words *ayant appartenu à l'Alle-*

Arbitrator's Opinion

1. Even in that case, those words could be justified, because the words *administré*

¹ See also the Roumanian-German Mixed Arbitral Tribunal, *Weitzenhoffer v. German State* (T.A.M., *Recueil des décisions*, vol. 5, p. 942): 'Le texte français de la partie X [du Traité de Versailles] est particulièrement défectueux, plusieurs clauses pouvant être interprétées de deux ou trois manières. ... Dans certains cas, le véritable sens a dû être fixé par les T.A.M. Dans d'autres cependant, le texte anglais—qui fait foi comme le texte français ...—tranche la difficulté, sa rédaction claire ne permettant qu'une interprétation.'

magne ou à ses alliés would be useless so far as Germany was concerned (since the territories ceded under the Treaty of Versailles had necessarily belonged to Germany) and absurd so far as its allies were concerned (since territories belonging to Germany's allies could not be ceded under the Treaty of Versailles).

2. The corresponding provisions of the Treaties of Saint-Germain (article 211) and of Trianon (article 194), drawn in clear terms, applied not only to territories ceded by Austria and Hungary but also to territories ceded by their allies; there was no reason to place Germany in a more favourable situation than that of its allies.

Interpretation of the German Government

The words *en vertu du présent Traité* referred to *cédé* as well as to *administré par un mandataire*, for the following reasons:

1. As there was no comma after *cédé*, those words could not, by reason of their place at the end of the sentence, apply solely to *administré par un mandataire*.

2. If the words in question did not refer to *cédé*, the title of the cession would not have been stated, which would have been contrary to the regular practice of the authors of the Treaty.

3. Article 312, speaking of the administration of mandated territories, contained a reference to article 22; if article 260 contained only a general reference to 'the present Treaty', it was because, in that context, the title covered cession as well.

4. If the title under which the cession had been effected was not stated, the provisions of article 260 could in the future apply to any territory which Germany or its allies might cede subsequently.

par un mandataire en vertu du présent Traité referred to article 22 of the Treaty of Versailles, which dealt with the administration by a mandatory of certain territories including some former possessions of the Ottoman Empire which had been an ally of Germany.

2. It was indeed very improbable that such had been the intention of the Allied and Associated Powers. But the argument was not decisive.

Arbitrator's Opinion

1. It did not seem absolutely necessary, the text being as it was, to read the words in question with *cédé* as well as with the words that followed.

2 and 3. Those arguments had some weight but were not decisive; other articles could be cited in which the title giving rise to a right or an obligation was not stated, and a lack of uniformity in the drafting was easily understandable in view of the size of the Treaty.

4. Nobody would dream of applying those provisions to territories ceded under treaties other than those which had put an end to the World War.

Finding, therefore, that neither of the two interpretations could be regarded as fully convincing, the Arbitrator chose the one which corresponded to the meaning of the English text, that is to say, the one proposed by the Reparation Commission:

'La situation se présente donc ainsi: il y a un texte clair — le texte anglais — et un texte qui n'est pas clair et dont le sens a besoin d'être dégagé par une interprétation — le texte français. Les deux textes font foi. Ils ont tous les deux été soumis à la signature des Parties. Dans ce cas, il ne semble pas permis de faire abstraction du texte anglais et d'interpréter le texte français, comme si le texte anglais n'existait pas. Au contraire, le texte clair, le texte anglais, fournira le meilleur moyen pour l'interprétation du texte français. Les deux textes sont évidemment destinés à exprimer les mêmes idées. S'il y avait deux textes également clairs mais qui ne se [*sic*] concordaient pas entre eux, on pourrait soutenir que le texte qui comportait le moins d'obligations pour la partie obligée mériterait la préférence.¹ Mais si l'un des textes est clair et l'autre ne l'est pas, la solution qui s'impose est celle d'interpréter le texte moins clair à la lumière de l'autre texte et conformément au sens qui résulte des termes de ce dernier texte.'²

In other arbitral awards, the same method seems to have been followed as a matter of course. In *Rafael Aguirre v. United States*, for example, Umpire Thornton expressed the opinion that the United States-Mexican Mixed Commission could not rule on a group of claims in a single decision because that procedure was contrary to the letter and spirit of the Convention of 4 July 1868; he invoked, in particular, the clause of Article III requiring the Commissioners to rule on 'every claim' (*todas las reclamaciones*) within a fixed time limit, and pointed out that the Spanish *todas las reclamaciones* was a poor rendering of the English 'every claim', which meant 'each one of all the claims' or, in other words, *cada una de todas las reclamaciones*.³ Similarly, in *Deutsche Gasglühlicht A.G. and Osram G. m.b.H. v. International General Electric Co. Inc., New York*, the Italian-German Mixed Arbitral Tribunal referred to the English text in order to determine the meaning of a passage in Article 310 of the Treaty of Versailles, the French text of which seemed open to two interpretations.⁴

In either case, the plurality of texts facilitates interpretation by limiting the number of possible solutions; by combining the possible modes of expression in the different languages, it helps to give a meaning to the inevitable ambiguous phrases and to place the authors' thoughts in a more accurate perspective. In the second case, the judge is even able to adopt the text which lends itself to only one construction without further ado. That text then becomes the decisive element on which the entire weight of the interpretation rests. The party which may wish to have it set aside admittedly retains the possibility of reducing its authority by showing, for example, that it is in fact a mere translation prepared without leave from the authors of the treaty. The task is not easy, as a derogation from the principle of the equality of texts cannot be presumed. This was shown in the decision given by the Special Mexican-United States Claims Commission in *Naomi*

¹ On this argument, see below, pp. 113-14.

² United Nations, *Reports of International Arbitral Awards*, vol. 1, pp. 437-9.

³ Moore, *International Arbitrations*, vol. 2, pp. 1307-8.

⁴ T.A.M., *Recueil des décisions*, vol. 5, pp. 481-2.

Russell (United States) v. Mexico. Under Article III of the Convention of 10 September 1923¹ the Commission was to adjudicate certain claims relating to loss or damage caused to United States citizens:

English text

...
(2) By revolutionary forces as a result of the triumph of whose cause governments *de facto* or *de jure* have been established, or by revolutionary forces opposed to them.

Spanish text

...
(2) Por fuerzas revolucionarias que hayan establecido al triunfo de su causa gobiernos *de jure* o *de facto*, o por fuerzas revolucionarias contrarias a aquéllas.

One of the questions in the case was whether Mexico was bound, under the final phrase of that paragraph, to make reparation for damages caused by supporters of Orozco, an insurgent General who had failed to seize power. The two commissioners, however, could not agree on the meaning of that phrase. Commissioner Nielsen, for the United States, considered that in the English text 'them' referred to 'governments' and that the phrase covered, *inter alia*, insurgents who had not succeeded in forming a government. Since that interpretation did not dovetail with the Spanish text, in which *aquéllas* could only refer to *fuerzas*, he contended that the latter text was only a translation and inaccurate in that respect. While admitting that the Convention had been signed in Spanish as well as in English and that it contained no clause applicable in case of discrepancy between the texts, he relied on the following declarations extracted from the records of the meetings of the Commission which had drawn up the Convention:

'The American (*Mexican*) Commissioners stated in behalf of their Government that the text in English of the special claims convention and the text in English of the general claims convention as hereinafter written as a part of these proceedings are approved by the President of the United States (*by the Mexican Government*) and in the event that diplomatic relations are resumed between the two Governments these conventions as hereinafter set forth will be signed forthwith by duly authorized plenipotentiaries of the President of the United States (*of the President of the United Mexican States*).

...
'The negotiations connected with the formulating and drafting of the general claims convention and the special claims convention were conducted in English. The texts of such conventions as hereinafter set forth in the records of these proceedings were prepared in English and are approved as the originals.'

Commissioner Nielsen added that it would not be appropriate to attach too much importance to the grammatical construction of the clause in question, as the intention of the parties had been repeatedly stated elsewhere, and that 'them' could relate to 'forces' provided the view was taken that

¹ *U.S. Treaty Series*, No. 676.

opposition to the revolutionary forces that had established a government constituted also opposition to that government.¹ In the Mexican Commissioner's submission, 'them' related to 'forces', as did *aquéllas* to *fuerzas*, and the phrase referred to revolutionary groups which had at first seemed to oppose the ultimately triumphant revolution but had subsequently taken part in the seizure of power. If the English text were ambiguous, it had to be construed in the sense more favourable to the party that was bound²—especially since Mexico had assumed its obligation *ex gratia*—and accordingly the Mexican argument should prevail even if the English text were taken as a basis. In case of divergence between the texts, the more restrictive interpretation had to be adopted (*P.C.I.J.*, case of the *Mavrommatis Palestine Concessions*). The Spanish text, which was unambiguous, had the same authority as the English and should also be used for purposes of interpretation. Finally, according to the Mexican submission, it was not permissible to refer back to the preparatory work and, moreover, the documents relied upon by the United States Commissioner were not relevant: it was not a matter of negotiations between plenipotentiaries, diplomatic relations had not yet been restored and the text in question had subsequently been changed.³

The Presiding Commissioner, whose role in the case was rather that of an umpire, found that the English text of the disputed sentence was ambiguous while the Spanish text was perfectly clear, and that the Convention had been signed in both languages without any stipulation as to which of them should prevail in the event of any divergence. He therefore, in effect, opted for the interpretation compatible with both texts and recognized that, when an instrument is concluded in two languages, both versions carry equal authority unless otherwise provided.⁴

(2) *Obscure or vague texts*

When confronted with two or more texts of varying clarity and precision, it is normal that the judge gives preference to the clearest and most precise version. In the cases just considered where one of the texts facilitated the choice between the several possible interpretations to which the other lent itself, each of those possible interpretations led to a well-defined result, so that once a choice was made, the two texts were deemed to express clearly

¹ United Nations, *Reports of International Arbitral Awards*, vol. 4, pp. 816–28.

² On this point, see below, pp. 113–14.

³ United Nations, *Reports of International Arbitral Awards*, vol. 4, pp. 856–75.

⁴ *Ibid.*, pp. 876–8. On the second point, the Presiding Commissioner added that, furthermore, the Spanish text of the passage in question appeared in several similar conventions concluded between Mexico and other countries, so that even if the disputed passage was a translation, the same was correct and represented the true intention of its negotiators. This last argument is difficult to reconcile with the principle *res inter alios acta* (see the Dissenting Opinion of Commissioner Nielsen, *ibid.*, pp. 881–2).

the intention of the parties and the judge gave effect to one as to the other. By contrast, an obscure or vague text fails to express or expresses badly the intention of the parties, and when the judge opts for the clearest and most precise he is, in fact, giving effect to that version alone.

The different texts, however, are all in principle invested with equal authority. The rule that the clearer text must prevail therefore presupposes, first, that the principle of the equality of texts does not apply to the passage under consideration and, secondly, that the clear text necessarily expresses the true intention of the parties. The first point does not raise special difficulties, for the parties could not have wished the judge to violate the rules of logic by giving the same effect to texts leading to different solutions. As to the second point, it constitutes a reasonable presumption but nothing more; while it is true that the obscurity of a text is often due to the negligence of its author, it would be wrong to exclude in advance the possibility of a deliberately imprecise expression which might have been distorted, in one of the authentic versions, by a more precise term.

Accordingly, courts and tribunals only resort to the rule of the supremacy of the clear text with prudence and discretion. In the case of *German Reparations under Article 260 of the Treaty of Versailles*, for example, Arbitrator Beichmann only applied it in order to confirm an interpretation which he would have adopted in any event. Article 260 of the Treaty of Versailles authorized the Reparation Commission to require Germany to hand over to it the rights and interests which German nationals held 'in any public utility undertaking . . . operating in Russia, China . . .' (*dans toute entreprise d'utilité publique . . . en Russie, en Chine . . .*). After ascertaining, as did the parties to the dispute, that the article did not contemplate head offices, the Arbitrator held that the English text ('operating in . . .') left no doubt as to the fact that the authors had envisaged, not the head office of the undertakings in question, but their place of operation.¹ It would be wrong to conclude, however, that the clearer text cannot serve as the decisive criterion in matters of interpretation. It even happens that a court or tribunal rewrites, so to speak, the obscure text in the light of the clear one. In paragraph 3 of the Annex to Section IV of Part X of the Treaty of Versailles, it was said that the expression 'exceptional war measures' meant, among other things, 'measures which [had] had . . . as an object the seizure of, the use of, or the interference with enemy assets' (*les mesures qui [avaient] eu . . . pour objet de saisir, d'utiliser ou de bloquer les avoirs ennemis*). In *Louis Stott v. German Government*, the Anglo-German Mixed Arbitral Tribunal relied on the French text in order to clarify and restrict the meaning of the word 'interference'. It ruled that the words *bloquer les avoirs ennemis* meant an action by which, though the assets themselves were not

¹ United Nations, *Reports of International Arbitral Awards*, vol. 1, p. 495.

directly seized or used, the owner's right of disposal was withdrawn, and concluded that 'interference' corresponded to 'locking up'.¹

The situation is different when the less clear text is in itself sufficient for purposes of interpretation. In that case, the judge genuinely gives effect to both texts and invokes the clearer one only in order to give greater persuasive force to his judgment. In the case concerning the *Acquisition of Polish Nationality*, for example, Arbitrator Kaeckenbeeck decided that, under Article 91 of the Treaty of Versailles and Articles 3 and 4 of the Treaty concluded on 28 June 1919 between the principal Allied and Associated Powers and Poland,² domicile did not require uninterrupted residence but only an habitual and regular presence; that, the Arbitrator held, was particularly apparent from the English text, which spoke of 'habitual residence'.³ Similarly, in the case of the *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, the Permanent Court of International Justice interpreted a passage from Article 104 of the Treaty of Versailles and added: 'This appears more clearly from the French text of the article.'⁴ There are, thus, many instances in which the judge merely used the text which he considered more appropriate. In *Stuttgarter Lebensversicherungsbank v. John Turvill and German Clearing Office v. British Clearing Office*, for example, the Anglo-German Mixed Arbitral Tribunal used the French text as an aid in the interpretation of the English text of a passage of paragraph 11 of the Annex to Section V, Part X, of the Treaty of Versailles;⁵ but in *P. Negreanu et Fils v. Meyer et Fils*, the Roumanian-German Mixed Arbitral Tribunal relied to a greater extent on the English text in order to reject an interpretation—in itself most far-fetched—of the seventh and eighth paragraphs of Article 440 of the same Treaty.⁶ In this context, it is worth noting the possible usefulness of translations which have been given the authority of authentic texts. While it is true that translations are most often a source of error, there is no denying that a considered and *nuancée* translation, uninhibited by the word-for-word mentality, can cast light on the original text and may even surpass it in accuracy; if the parties, after due consideration, have placed thereon the seal of authenticity, such a translation not only does not lead the judge

¹ T.A.M., *Recueil des décisions*, vol. 5, pp. 287–8.

² Martens, *N.R.G.*, 3rd Series, vol. 13, p. 505 (French text); *United Kingdom Treaty Series* (1919), No. 8, pp. 5–6 (English text). The English and French texts of that Treaty are both authentic (Article 21).

³ United Nations, *Reports of International Arbitral Awards*, vol. 1, pp. 407–409.

⁴ *P.C.I.J.*, Series A/B, No. 44, p. 26. The Mixed Arbitral Tribunals also often relied on the clearer text in order to corroborate an interpretation which a proper understanding of the other text demanded in any event. See, for example, Franco-German Mixed Arbitral Tribunal, *Chervet v. Schwobthaler*, T.A.M., *Recueil des décisions*, vol. 2, pp. 797–8 (clearer arrangement of the English text); German-Belgian Mixed Arbitral Tribunal, *Cie du Pegamoïd v. Preussische Staatsbank and German State*, *ibid.*, vol. 3, p. 567 (clearer punctuation of the English text). See also Anglo-German Mixed Arbitral Tribunal, *Dr. L. Levinson v. Lebensversicherungsgesellschaft, Leipzig*, *ibid.*, vol. 6, p. 664.

⁵ *Ibid.*, vol. 6, p. 55.

⁶ *Ibid.*, vol. 5, pp. 207–8.

astray but assists him in his interpretation. In its Advisory Opinion on the *Interpretation of the Convention of 1919 concerning Employment of Women during the Night*, the Permanent Court showed that the words used in Part XIII of the Treaty of Versailles, in both the French and English texts, to describe the individuals who were subjects of the I.L.O.'s activities did not apply only to manual workers but to all workers, and pointed out that in the fifth paragraph of Article 393 the word 'workers' in the English text was rendered as *employés et ouvriers* in the French text.¹

Just as a clear expression prevails over a vague expression, so does a technical term prevail over a general one. This is particularly true in the case of texts dealing with juridical questions. When one of the texts uses a legal term while the other employs, in the corresponding place, a general term, courts and tribunals ordinarily presume that the second text is, at least at that point, an incorrect translation of the first. Paragraph 20 of Annex II to Part VIII, Section I, of the Treaty of Versailles provided that in specifying or accepting the payments to be made by the assignment of specific property or rights, the Reparation Commission would take into account 'any legal or equitable interests of the Allied and Associated Powers or of neutral Powers or of their nationals therein' (*tous droits et intérêts légitimes des Puissances alliées et associées ou neutres et de leurs ressortissants dans lesdits*). In the case of the *Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers*, the arbitral tribunal established pursuant to the Agreement concluded on 7 June 1920 between the Reparation Commission and the Government of the United States stated that there was a 'notable discrepancy' between the two texts, because the words 'legal or equitable interests' expressed notions well known in Anglo-American law while the words *droits et intérêts légitimes* corresponded to no definite legal idea whatever. It concluded therefrom that the French expression was only a translation of the English, which latter text also fitted into the context, and interpreted the paragraph according to the meaning of the words 'legal or equitable interests' in English law.² The same Treaty provided, in Article 296 (b), that the contracting parties would be responsible for the payment of certain debts owed by their nationals 'except in the cases where before the war the debtor was in a state of bankruptcy or failure, or had given formal indication of insolvency' (*sauf dans le cas où le débiteur était, avant la guerre, en faillite, en déconfiture ou en état d'insolvabilité déclarée*). In *J. J. Seligman v. Baron W. von Liebermann*, the Anglo-German Mixed Arbitral Tribunal interpreted that provision. There was no question of bankruptcy and the 'formal indication of insolvency' presented no difficulties, because it was stated in paragraph 4 of the Annex to Section III of Part X that that

¹ *P.C.I.J.*, Series A/B, No. 50, p. 375.

² United Nations, *Reports of International Arbitral Awards*, vol. 2, p. 792.

expression bore the same meaning as it had in English law. As to the word 'failure', the Tribunal pointed out that it was doubtless a translation of the word *déconfiture*; and it accordingly considered only the latter, in the light of French doctrine and judicial rulings.¹ These two examples not only illustrate the rule that the technical, and more especially the juridical, term prevails but also show the risks which that rule entails. In the case of a term of international law, these risks are generally negligible. With a term expressing a notion of domestic law common to all the contracting parties, the rule also retains all of its usefulness. But if the notion expressed is only known in the legal system of one of those parties, the greatest circumspection must be maintained and the judge must ascertain whether the contracting parties had indeed intended to adopt it, as such, in their mutual relations. At the time of the drafting of a treaty, it is possible to preclude any dispute on this point by stipulating that given provisions shall be governed by the law of a specified country. This was done, as was shown above, by the authors of the Treaty of Versailles as regards a formal indication of insolvency. But if the treaty contains no provision of that kind, the aforesaid rule authorizes a presumption, for purposes of interpretation, in favour of the juridical term. It nevertheless remains possible for any party to the dispute to prove that the contracting parties had not intended to adopt without qualification a notion known only in one legal system; such proof, however, is difficult to adduce on the basis of the text alone. Finally, it should always be borne in mind that diplomatic instruments are seldom drawn up with the formal accuracy of acts of municipal law. The judge must therefore interpret them somewhat liberally or risk drawing from the text inferences which it does not contain. In *Paalen v. German Empire*, for example, in order to show that the word *jugement* in Article 305 of the Treaty of Versailles had doubtless not been used in its strict legal sense, the German-Czechoslovak Mixed Arbitral Tribunal invoked the English text, which used the word 'decision'.² At the end of Article 305, however, the English text also speaks of 'judgment'.

B. *Reference to the context*

If it is impossible to reconcile the texts by a mere comparison, the judge may refer to the context in order to show that in one of the texts a given

¹ T.A.M., *Recueil des décisions*, vol. 1, p. 733.

² *Ibid.*, vol. 3, p. 997. See, for an example of liberal interpretation of a legal term, the decision of the German-Belgian Mixed Arbitral Tribunal in *Peeters, van Haute and Duyver v. Trommer and Grüber*. Article 299 (a) of the Treaty of Versailles provided that 'Any contract concluded between enemies shall be regarded as having been dissolved as from the time when any two of the parties became enemies' (*Les contrats conclus entre ennemis seront considérés comme ayant été annulés à partir du moment où deux quelconques des parties sont devenues ennemies*). In the aforesaid case, the Tribunal ruled, basing itself principally on the context, that the word *annulés* was not used in the sense understood in French law but in the sense of *résiliés*; the English text, in the Tribunal's opinion, confirmed that interpretation, for it used the word 'dissolved', the significance of which was not in doubt (*ibid.*, vol. 2, p. 393).

term is not used in its ordinary sense. This method is particularly applicable when, in its ordinary sense, a term is more restricted in one text than in the other. The judge may then effect the necessary adjustment by modifying the scope of the term in the light of the context, which he can do either by extending it in one text or restricting it in the other. The decisions of international tribunals confirm that either of these steps may properly be taken.

The Permanent Court employed the first method in its Advisory Opinion on the *Competence of the I.L.O. with respect to Agricultural Labour*. The French Government had challenged the competence of the I.L.O. in agricultural matters and, at its request, the League of Nations Council had invited the Court to give an advisory opinion on the question whether the competence of the I.L.O. extended to the regulation of working conditions of persons employed in agriculture. The French Government argued, among other things, that Part XIII of the Treaty of Versailles, which defined the competence of the I.L.O., contained no express mention of agriculture while the terms *industrie* and *industriel* appeared in several places therein and governed the whole of Part XIII. The Government relied particularly on Article 393, which provided that eight of the governmental representatives on the Governing Body of the I.L.O. would be nominated by members 'of the chief industrial importance' (*dont l'importance industrielle est la plus considérable*), and on Article 427, which stated that there were certain principles which all 'industrial communities' (*communautés industrielles*) should make an effort to apply. Being thus limited to the regulation of industrial work, the competence of the I.L.O. could not, according to the French Government, be extended to agriculture by interpretation, as conventions which limited the prerogatives of the State must be interpreted restrictively.¹ In contesting that submission, the I.L.O. pointed out, *inter alia*, that the Commission on International Labour Legislation, which the Paris preliminary Peace Conference had, on 31 January 1919, instructed to elaborate the clauses of the Treaty of Versailles relating to labour, had taken as its basis of discussion an English text presented by the British delegation. In the course of its work, the Commission had formally recognized that the word 'industrial' applied both to industry and to agriculture. It had therefore deliberately translated 'industrial organisations' by *organisations professionnelles* (Article 389), 'industrial associations' by *associations professionnelles*² (Article 409), 'conditions of industrial life and labour' by *condition des travailleurs et du régime du travail* (Article 396), and 'questions of industry and employment' by *questions ouvrières* (Article 397). Whenever the words *industrie* and *industriel* had

¹ See the Memorial of the French Government of 13 June 1922 (*P.C.I.J.*, Series C, No. 1, pp. 541-2), the oral statement by A. de Lapradelle, representative of the French Government (*ibid.*, pp. 160-75), and the additional observations to that statement (*ibid.*, pp. 186-7).

² *Organisation professionnelle* in the final text.

been used to correspond to 'industry' and 'industrial', the Commission could not have translated otherwise without encumbering the text or distorting the meaning.¹ Similarly, the Peace Conference had unanimously adopted, in connexion with Article 427, an amendment in which, at the express request of a representative, the words 'industrial wage-earners' had been translated, in order to eliminate all doubt, by *travailleurs salariés* and not by *salariés industriels*.²

The Court replied in the affirmative to the question that had been put to it. In its Advisory Opinion, it did not dispute the validity of the principle according to which conventions involving the abandonment of certain rights inherent in sovereignty must be interpreted restrictively, but it pointed out that, in every case, the question must resolve itself into what the terms of the treaty actually meant.³ It then considered the text of Part XIII 'read as a whole', avoiding any analysis of 'phrases which, if detached from the context, may be interpreted in more than one sense', and arrived at the conclusion that the competence of the I.L.O. in agricultural matters was beyond all doubt. Next, in refuting the argument based on the use of the words *industrie* and *industriel*, it recalled that the French and English texts of the Treaty of Versailles were equally authentic, and held, on the basis of Littré and the *Oxford Dictionary*, that those words were not essentially different from 'industry' and 'industrial' and could, in a wide sense, include agriculture. The Court admitted that in modern speech the adjective was, especially in French, most commonly used in relation to the arts or manufactures, and would ordinarily be so understood unless the context indicated that it was to be interpreted otherwise. But the context was the 'final test' and, in the Court's opinion, it clearly showed that the adjective had been used in its wide sense.⁴

¹ The French Government argued *a contrario*, saying that each time the words *industrie* and *industriel* had been used, the intention had been to retain their strict meaning (oral statement cited above, pp. 173-4).

² See the memorandum containing the observations of the International Labour Office (*P.C.I.J.*, Series C, No. 1, pp. 464-72), the oral statement of A. Thomas, Director of the I.L.O. (*ibid.*, pp. 228-34 and 255-6), and the additional observations to that statement (*ibid.*, pp. 273-4). See also the oral statement of S. T. Talbot, representative of Great Britain (*ibid.*, pp. 201-4).

³ The Court seems to have implied thereby that the principle applied only when the meaning of a clause remained doubtful despite the efforts of the interpreter. See below, pp. 113-14.

⁴ *P.C.I.J.*, Series B, Nos. 2 and 3, pp. 23-27 and 33-41. Since the text of the Treaty itself had enabled it to conclude that agricultural work came within the I.L.O.'s competence, the Court did not consider it necessary to refer to the preparatory work (*ibid.*, p. 41). It seems, however, that such extrinsic evidence indeed had some influence on the opinion of the judges. In its Advisory Opinion, the Court pointed out that too much importance had been attached to the occasional use in the Treaty of the French adjective *industriel*; that the word *professionnel*, used in certain clauses for the purpose of clearly including agriculture, was not applicable in other connexions; that in Article 393, for example, *importance professionnelle* would have been too wide in its meaning; and that it was difficult to find for that purpose any word in French which would not be open to objection as either too wide or too narrow (*ibid.*, p. 39). These observations, clearly prompted by the explanations given by the I.L.O., are difficult to understand unless it is remembered that the authors of the text had taken an English text as the basis of discussion.

Arbitrator Vigliani resorted to the opposite method in his Award of 30 January 1897 concerning the *Manica Frontier*. Great Britain and Portugal had on 11 June 1891 concluded a treaty, Article II of which fixed the demarcation line between the zones of British and Portuguese influence in East Africa south of the Zambezi. The treaty had first been drawn up in English and initialed in London by representatives of the two countries; a Portuguese version had then been drawn up and collated with the English, after which both versions had been signed at Lisbon without any stipulation as to which was to be deemed authentic. The treaty subsequently gave rise to divergent interpretations, largely due to the duality of texts. One issue was the meaning of the passage where it was stated that the frontier 'follows the upper part of the eastern slope of the Manica plateau' (*acompanha a crista da vertente oriental do planalto de Manica*). The question was whether that provision referred to the crest (*crista*) of the slope, in other words the line separating the slope from the plateau, or to the entire 'upper part' of the slope. Pursuant to a *compromis* of 7 January 1895, the two parties submitted their dispute to arbitration. The *compromis* reproduced the English and Portuguese texts of the relevant provisions and also contained a translation into French, the language chosen for the arbitral proceedings. In his Award, the Arbitrator recalled the different phases in the preparation of the treaty and concluded that both texts could be considered original; in any case, they were to be used equally for the purposes of interpretation. As to the words 'upper part' (*crista*), he noted that the parties had agreed to interpret them in the sense of *bord supérieur* and that the word 'follows' (*acompanha*) would lose its true significance if it referred to a zone and not to a line. That interpretation, he held, was certainly consistent with the spirit of the Convention, reconciled the two texts and eliminated all difference between the expressions 'upper part' and *crista*.¹

C. Reference to extrinsic evidence

When the different versions cannot be reconciled by means of comparison even with the aid of the context, it would still be premature to conclude that the texts are incompatible. For the judge is always entitled to leave the texts temporarily aside, to consider the instrument from a higher angle, to refer to all the extrinsic evidence which may cast light on the matter—

Moreover, did the Court not rule on the content of the preparatory work when it said, at the end of its Opinion, that there was 'certainly nothing' therein to disturb its conclusion? It should be noted that the Court requested the French Ministry for Foreign Affairs to produce the records and other preparatory documents of the Commission on International Labour Legislation and of the Peace Conference (plenary meetings devoted to labour questions), believing them to be necessary for its consideration of the request for an advisory opinion (*P.C.I.J.*, Series C, No. pp. 496, 501, 503 and 533).

¹ La Fontaine, *Pasicrisie internationale*, pp. 485-9.

ratio legis, the economy of the treaty, the logical or illogical consequences of all the possible interpretations, &c.—and to return to the texts only when he has formed an opinion; it may then happen that, in the light of his findings, the divergences between the texts will appear insignificant. The fact that this method has been used is not always clear from a first reading of the judgment. It would seem, however, that the Umpire of the German-Venezuelan Mixed Commission resorted to it in the *Flothow* case. Article III of the Protocol of 7 May 1903 regarding that Commission, an instrument concluded in German and in English, gave, to the Commission according to the German text and to the commissioners according to the English, the right to extend in certain cases the time limit stipulated for the submission of claims. The Venezuelan Commissioner contended, on the basis of the English text, that the Umpire was not competent in the matter. The Umpire rejected that submission, ruling that the word ‘Commissioners’ in the English version of Article III was, as elsewhere in the Protocol, synonymous with ‘Commission’ and that any other finding would be equivalent to giving the Venezuelan Commissioner the power to prevent any extension whenever he wished, which could not have been the intention of the parties.¹

If the judge can also show that the authenticity of the text which seems at variance with his interpretation is somehow open to question, his argument is naturally strengthened. An attempt—perhaps unsuccessful—to invest an award with this additional persuasive force was made by Umpire Thornton in *Rafael Aguirre v. United States*. Under Article 11 of the Treaty of Guadalupe Hidalgo, concluded on 2 February 1848 with Mexico, the United States had undertaken to prevent and punish incursions into Mexican territory by Indian tribes under United States jurisdiction. Subsequently, the manner in which the United States Government was fulfilling that undertaking evoked many complaints from the Mexican Government and on 30 December 1853, in order to improve relations, the two Governments signed a treaty providing, *inter alia*, for the abrogation of the said Article 11. That latter treaty was ratified, after amendment by the United States Senate; its Article 2 read as follows:

English text

The Government of Mexico hereby releases the United States from all liability on account of the obligations contained in the eleventh article of the treaty of Guadalupe Hidalgo; and the said article and the thirty-third article of the treaty of amity, commerce and navigation

Spanish text

El gobierno de México por este artículo exime al de los Estados Unidos de las obligaciones del Artículo 11 del tratado de Guadalupe Hidalgo; y dicho artículo, y el 33 del tratado de amistad, comercio y navegación entre los Estados Unidos Mexicanos y los Estados Unidos de

¹ Ralston, *Venezuelan Arbitrations of 1903*, pp. 515–18 and 583.

between the United States of America and the United States of Mexico concluded at Mexico on the fifth day of April 1831 are hereby abrogated.

América, y concluido en México el día 5 de abril de 1831, quedan por éste derogados.

Those clauses gave rise to the liveliest of controversy. Relying on the Spanish text, where there was no equivalent of the expression 'all liability', Mexico contended that Article 2 made provision only for the future and that the United States remained bound to repair the damage occasioned through its failure to comply with the obligations imposed upon it by Article 11 of the Treaty of Guadalupe Hidalgo. The dispute was brought before the United States-Mexican Mixed Commission, and Umpire Thornton rejected the Mexican contention. In his Award of 16 April 1874 he showed that the authors of the 1853 Treaty had intended to eliminate every cause of disagreement between the two countries and that they had compensated Mexico for its renunciation of its rights under Article 11 of the Treaty of Guadalupe Hidalgo. He then held that the first sentence of Article 2 of the 1853 Treaty could only refer to past claims, since future claims could not arise in consequence of the abrogation of Article 11; furthermore, if the first sentence had been simply a pleonasm, the authors of the Treaty would have reversed the order of the sentences and mentioned the abrogation before its consequences. Finally, the Umpire sought to demonstrate that, so far as the meaning was concerned, the Spanish version did not differ from the English; and in any event, he added, whether the Spanish translation was correct or incorrect, the Mexican Government alone was responsible therefor. He went on to recall how the 1853 Treaty had been prepared, and stressed that the Spanish version had never been submitted to the United States Senate; furthermore, the United States Secretary of State had informed the Mexican Minister in Washington of the amendments introduced by the Senate, so that they might be translated into Spanish before the exchange of instruments of ratification, but the Secretary of State had not been consulted regarding the correctness of the translation; moreover, in view of his perfect knowledge of English, the Mexican Minister could not have misunderstood the meaning of the English version, which he had indeed correctly rendered into Spanish.¹ In this Award, it is clear that the Umpire employed the method described above: reference to the *ratio legis*, a logical interpretation of the Treaty and a systematic examination of the article concerned, followed by an attempt at

¹ Moore, *International Arbitrations*, vol. 3, pp. 2430-47. The passage of the Award regarding the preparation of the 1853 Treaty contains certain inaccuracies. A search in the archives of the Department of State revealed that nine days before the exchange of ratifications the Spanish text was in the hands of the Department of State, which seems to have considered it carefully and deemed it to correspond to the English (Miller, *Treaties and other International Acts of the United States of America*, vol. 6, pp. 414-15).

reconciling the texts. And although the arguments with which the Umpire strove to discredit the inconvenient text are perhaps unconvincing—he seems to have confused an authentic text with an *ex parte* official translation and he failed to distinguish between the national and international aspects of the conclusion of treaties—they are, nevertheless, highly significant from the standpoint of interpretation technique. The Award seems to mark the borderline between the conciliation of texts and reference to the original text; as the possibilities open under the first procedure become exhausted, increasing reliance must be placed on the second. Before considering the latter, however, a brief reference should be made to a final expedient which, in exceptional cases, may make the conciliation of divergent texts possible.

D. *Reference to preparatory work.*

When a study of the successive stages in the preparation of different texts makes it possible to establish, on the basis of documentary evidence, how the divergence came into being, the problem of interpretation disappears. Under Article 78 (6) of the Treaty of Peace with Italy, nationals of the United Nations were exempted from all exceptional taxes imposed on their capital assets in Italy by the Italian Government between 3 September 1943 and the date of entry into force of the Treaty 'for the specific purpose of meeting charges arising out of the war or of meeting the costs of occupying forces or of reparation payable to any of the United Nations'. The Russian text agreed with the English, *so spetsialnoy tselyu* corresponding accurately to the words 'for the specific purpose'. The French version, however, seemed of a wider scope, for it used the phrase *en vue de couvrir les dépenses*. In the case of the *Extraordinary Taxes on Property imposed in Italy*, the Franco-Italian Conciliation Commission had to interpret this provision. The agent for the Italian Government having based an argument on the word 'specific' in the English version, the Commission—without examining the Russian version¹—restored conformity between the French and English texts by evoking their background. In the French text of the draft treaty prepared by the Council of Ministers for Foreign Affairs, the disputed passage had read: . . . *spécialement en vue de couvrir les dépenses*. . . . Thus placed, the word *spécialement* was liable to extend the exemption to all extraordinary property taxes, regardless of their purpose; according to the Commission, the authors of the Treaty had realized that and, believing also that the nuance introduced by 'specific' was not indispensable, had dropped the French adverb and simply stated *en vue de*. . . .² That finding, in which the role played by conjecture was minimal, left no doubt as to the

¹ See below, pp. 144–5. Here the Commission's indifference to the Russian text had no consequences, as the Russian and English versions were identical.

² *Recueil des décisions de la Commission de conciliation franco-italienne*, vol. 1, pp. 99–101.

meaning of the French version. It is rare, however, for preparatory work to help to explain a discrepancy with such certainty.

II. REFERENCE TO THE ORIGINAL TEXT

The methods of interpretation studied heretofore are all marked by the resolve of the judge to respect scrupulously the equality of the texts, whether that equality has been expressly stipulated in the treaty or whether it is implicit in the fact that the signatory States have concluded the instrument in several versions without any indications as to their respective authenticity. But the equality of the texts is not a sacrosanct principle and the case law of international tribunals shows that, even when a treaty contains a clause stipulating that the different texts shall be deemed equally authentic, the judge sometimes feels entitled to establish an order of precedence among them, at least on a specific point, and to recognize the superiority of the original version. At times the method of referring to the original text supersedes that of conciliating the different versions, either because they prove virtually incompatible or because the judge renounces the attempt at conciliation from the very outset; at other times the former is superposed upon the latter and the question then arises whether the two methods are not mutually exclusive, since one implies that the different versions are compatible, while the other only has a *raison d'être* if they are not. In both cases, the method of referring back to the original text raises two related problems. The first is the practical issue of the manner in which the original text should be determined. The second—of crucial importance, because it touches upon the very basis of interpretation—is of a juridical nature: the question of the value of the method as a means of ascertaining the will of the parties.

A. *Determination of the original text*

The adjective 'original' is taken here in its linguistic sense: the original version is the version drawn up in the original language and the original language is the one in which the text was first drafted. The notion of the original text is a complex one, conditioned by the different processes of elaborating international instruments. In theory, if not in practice, an instrument may be simultaneously prepared in two or more languages; there are then two or more original texts and the method considered here has no application unless, in addition to the original texts, other versions are drawn up subsequently in other languages, in which case an order of precedence can be established between the original versions and the others. On the other hand, it often happens that an instrument is, in its entirety, prepared first in only one language and then translated into one or more

other idioms. Thirdly, and most frequently, however, especially in modern diplomatic practice, the instrument is prepared in two or more languages but not simultaneously; the notion of the original text then applies to specific parts of the instrument, and it can be said, for example, that a given section, clause or sentence was originally drafted in a given language.

How, then, should the original text be determined? In exceptional cases, a provision on that point may appear in the instrument. For example, the attestation clause of the Treaty of Amity and Commerce between France and the United States, signed at Paris on 6 February 1778, read as follows:

'In Faith whereof the respective Plenipotentiaries have signed the above Articles, both in the French and English Languages, declaring nevertheless that the present Treaty was originally composed and concluded in the French Language. . . .'¹

Similarly, the Agreement of 17 July 1937 between the United Kingdom and the Soviet Union concerning the Limitation of Naval Armament, which had been drawn up in English, provided in Article 30 that a Russian text would be drawn up as soon as possible and agreed between the contracting Governments and that both texts would then be considered equally authentic;² the two Governments adopted the Russian text by an exchange of notes of 12 and 19 November 1937,³ whereupon there were two authentic texts but only one original.⁴ In most cases, however, it is up to the judge to determine the original text, and international case law shows that he can resort for that purpose to several expedients of varying value.

(1) *Presumptions drawn from the texts*

A comparative study of the texts generally enables the judge to draw, on the subject of the original text, certain presumptions the force of which runs in an inverse ratio to the translator's skill: the surest indices in this case are translation defects, mostly due to an inability to render ideas into ideas while respecting the genius of each language. The judge must of course avoid all subjectivity in his appreciation of the different versions.

In *Rymenans et Cie v. German State*, the agent of the German Government

¹ Miller, *Treaties and other International Acts of the United States of America*, vol. 2, p. 27. It is possible that the parties had in fact intended to say that only the French text was authentic, in which case the two texts would not have carried equal authority (see chapter II). See also the attestation clause of the Treaty of Alliance concluded on the same day between the same States (*ibid.*, p. 41).

² *League of Nations Treaty Series*, vol. 187, p. 120. See also the Protocol of Signature; *ibid.*, p. 122.

³ *Ibid.*, p. 124.

⁴ The same procedure was followed with the Southeast Asia Collective Defence Treaty, signed at Manila on 8 September 1954, Article XI of which reads as follows: 'The English text of this Treaty is binding on the Parties, but when the Parties have agreed to the French text thereof and have so notified the Government of the Republic of the Philippines, the French text shall be equally authentic and binding on the Parties' (*United Nations Treaty Series*, vol. 209, p. 34). The contracting States agreed upon the French text of the instrument on 14 April 1955 and later revised it by common agreement (*ibid.*, n. 1). See also the final clauses of the Convention on International Civil Aviation, signed at Chicago on 7 December 1944 (*ibid.*, vol. 15, p. 362 and n. 1).

contended before the German-Belgian Mixed Arbitral Tribunal that only 'differential' measures, i.e. those referring to alien property as such, could give rise to recourse to the Mixed Arbitral Tribunals; he relied principally on paragraph 1 of the Annex to Section IV of Part X of the Treaty of Versailles, which refers to:

English text

vesting orders and . . . orders for the winding up of businesses . . . , and . . . any other orders, directions, decisions or instructions . . . made or given . . . in pursuance of war legislation with regard to enemy property, rights and interests. . . .

French text

toutes mesures attributives de propriété, . . . toutes ordonnances pour la liquidation d'entreprises . . . ou . . . toutes autres ordonnances, règlements, décisions ou instructions rendues ou données . . . par application de la législation de guerre concernant les biens, droits ou intérêts ennemis.

According to the German Government, the word *concernant* in the French text related to *législation de guerre*. While denying that the aforesaid paragraph was the principal *sedes materiae*, the Tribunal, in its decision, rejected the German interpretation and held that the word *concernant* was a preposition equivalent to *en ce qui concerne* and introducing a phrase parallel to *par application de la législation de guerre*. It pointed out, among other things, that the words 'with regard to' in the English text related to the verbs 'made or given' rather than to 'war legislation', and that in the French text, which bore many traces of being a translation of the English, the proper words would have been, as in paragraph 3, *à l'égard de biens ennemis*, or at least a comma should have been placed after *législation de guerre*. In its decision, the Tribunal also referred to the English text in order to clarify the meaning of two other passages in the same paragraph: first, the words *toutes ces mesures restant nulles*, at the end of the paragraph, implied that the measures envisaged were ones which international law already regarded as void, but the English words 'shall be void' proved otherwise; secondly, the fact that in the fourth sentence of the paragraph the English text spoke only of 'war legislation', as in the first sentence, while the French text mentioned *législation exceptionnelle de guerre*, confirmed the Tribunal's belief that the word *exceptionnelle* was of little importance.¹ The decision, which goes into great detail and contains linguistic observations of considerable interest, was thus based, if only to a subsidiary degree, on the superiority of the English text which the Tribunal held to be the original. But was it sufficient to state that the French text 'bore many traces of being a translation of the English'? The decision would no doubt have had greater persuasive force if it had been more explicit on that point,

¹ T.A.M., *Recueil des décisions*, vol. 1, pp. 879-86. The Tribunal confirmed its interpretation of the words *concernant les biens* . . . in *Entreprises maritimes belges v. German State* (ibid., vol. 4, p. 94).

as is shown by the fact that in *Tesdorpf v. German State* the Anglo-German Mixed Arbitral Tribunal, basing itself on the French text, placed on the words 'war legislation with regard to enemy property, rights and interests' the opposite interpretation to that of the German-Belgian Tribunal.¹

(2) *Reference to the preparatory work*

While features of the text itself, even in the most favourable circumstances, never justify any more than a presumption, the preparatory work generally enables the judge, except when it is very fragmentary, to determine the original text of all or part of the instrument with certainty.² The interested party, however, must bring out the whole history of the provision in question and not merely invoke the preparatory work or refer to it in a somewhat vague manner; used summarily or indiscriminately, such work could serve as a pretext, here as elsewhere, for any interpretation that might be desired.

In the second paragraph of Article IV of the Italian-Venezuelan Protocol of 13 February 1903, drawn up in English and in Italian, Venezuela undertook to compensate Italian nationals who had suffered loss during the revolutionary occurrences after 1900. The English text of that paragraph began as follows: 'The Venezuelan Government admit their liability in cases where the claim is for injury to persons and property. . . .' In the Italian text the word used to correspond to 'injury' was *danni*, and the extent of the Venezuelan Government's liability depended on the meaning of those two words. The Government considered itself bound to indemnify only the damage for which it was responsible under international law, which excluded, unless there had been negligence on its part, damage caused by 'unsuccessful revolutionists'. And it is a fact, of course, that the word 'injury', in legal language, means only damage caused in violation of a right. The Italian Government, however, claimed reparation of all the damage caused to its nationals both by the Venezuelan Government and by the revolutionists, and relied *inter alia* on the general nature of the word *danno*. In the *Guastini* case, the Italian member of the Mixed Commission established by virtue of the Protocol dwelled at some length on the divergence between the two texts. He contended that the Italian text must prevail, relying among other things on the fact that the word *danno* appeared in an Italian memorandum that had been the starting-point in the elaboration of

¹ *Ibid.*, vol. 3, p. 28.

² It may happen that the parties to the dispute have by agreement precluded all reference to the preparatory work. For example, in the case of the *German Reparations under Article 260 of the Treaty of Versailles*, the parties to the dispute had declared, in the written pleadings, that save for the notes exchanged between the German delegation and the Allied and Associated Powers before the signature of the Treaty, the work preparatory to the Treaty of Versailles could not, in so far as it affected the extent of the obligations of the German Government, serve as the basis of the settlement of the dispute; Arbitrator Beichmann took due note of those declarations (United Nations, *Reports of International Arbitral Awards*, vol. 1, pp. 434-6; cf. above, pp. 83-85).

the Protocol and on the circumstance that the Spanish translation officially published by the Venezuelan Government spoke of *daños*. (He did not specify what legal consequences flowed from that translation. Did it, in his view, constitute an *ex parte* interpretation binding on Venezuela?) He also relied on the rule, stated in Fiore's *Diritto internazionale codificato*,¹ according to which, when a word has a different juridical meaning in one of the contracting States from that which it has in the other, it should be determined according to its meaning in the State to which the provision of the treaty refers.² The Venezuelan Commissioner rejected the Italian conclusions, but without giving any opinion on the respective value of the two texts. Umpire Ralston, in giving the decisive ruling, adopted the Venezuelan argument. He considered the question of the divergence between the texts and found in favour of the English. In his decision, he recalled that the Protocols of 1903 (between Germany and Venezuela, Great Britain and Venezuela, and Italy and Venezuela) had been concluded after negotiations between the representatives of Germany, Great Britain and Italy, on the one hand, and the representative of Venezuela, on the other hand, that those negotiations had been conducted almost altogether in English and that the drafts had been prepared in that language. He added that, in any event, *danno* could in legal language have the same meaning as 'injury' (an attempt to conciliate the texts) and that he should also, in case of divergence, find in favour of the party obligated (on this argument, see below, pp. 113-14).³ Thus the Italian Commissioner and the Umpire both relied on the preparatory work but in order to draw opposite conclusions; which goes to prove that any argument based thereon cannot be conclusive if the interpreter invokes it in a merely general manner, without showing, on the basis of documentary evidence, *how* the provision whereof the meaning is disputed came into being. The Italian Commissioner cited a preliminary memorandum drawn up in Italian; but he did not specify its role or importance in the successive phases of the preparation of the Protocol. The decision itself is perhaps also open to some criticism: the language used in the negotiations 'almost altogether' is an inadequate and vague basis for a finding; and again, for the interpretation of a single word, the language used in the draft Protocols is too general a criterion which would not apply to amendments drawn up in other languages.

It would seem that Arbitrator Huber adopted a more methodical approach in the case concerning the *British Property in Spanish Morocco*. Great

¹ 3rd ed., p. 310.

² On this argument, see below, pp. 115-16.

³ Ralston, *Venezuelan Arbitrations of 1903*, pp. 643-5 and 730-52. In his decision (*ibid.*, p. 749), Ralston stated that the text of the Protocol was in English and Italian; in a footnote (*ibid.*, p. 731, n. (a)), however, he said that the Protocol had been signed in English; as the instrument entered into force on its signature, the Italian text would in reality seem to be only a translation approved subsequently.

Britain and Spain had agreed, by paragraph 2 of an agreement concluded at Madrid on 29 May 1923, that the claims which had arisen in consequence of military operations, risings of the Cabiles or acts of bandits would fall in a special category:

English text

The Spanish Government shall furnish His Britannic Majesty's Government . . . with a list of those claims . . . which they consider result from military operations, risings of the Cabiles or acts of bandits.

Spanish text

El Gobierno español proporcionará al Gobierno de S. M. Británica . . . una lista de aquellas reclamaciones . . . que se consideren derivadas de operaciones militares, sublevaciones de las Cabilas o actos de bandidaje.

Although, according to the English text, the preparation of the list in question seemed to have been left to the discretion of the Spanish Government ('they . . .'), the British Government claimed the right to challenge the composition of that list. The Arbitrator held that that argument was consistent with the agreement; the Spanish text, he pointed out, . . . *qui, d'après la genèse de la disposition, peut être considéré comme l'original, paraît mieux se conformer au principe qui est énoncé dans l'article mis en tête de l'Accord*.¹ In this instance, the Arbitrator concentrated on the disputed provision and studied its genesis, although it is to be regretted that the decision is not more explicit on this point.²

It is worth mentioning at this stage the possible relevance, in determining the original text, of the identity, nationality and mother-tongue of the authors of the instrument. In its Advisory Opinion on the *Interpretation of the Convention of 1919 concerning Employment of Women during the Night*, the Permanent Court of International Justice took pains to show that there was no reason to believe that the Committee entrusted by the First Labour Conference with the study of the question of the employment of women had intended to limit the application of the Convention only to working women (*ouvrières*). The Court noted that in the French text of the Committee's report, the word *femmes* appeared on six occasions while the word *ouvrières* appeared only once, and even then in a place where the English text did not correspond to the French and spoke of 'women workers'. And, the Court added, 'Miss Smith, who submitted the report, was English and used her own language'.³ No doubt the Court merely meant that, since

¹ United Nations, *Reports of International Arbitral Awards*, vol. 2, pp. 620 and 627-8. The Spanish text of the agreement appears in [Huber and Hammarskjöld], *Réclamations britanniques dans la zone espagnole du Maroc, Rapports* (The Hague, 1925), pp. 14-15.

² See also the Judgment of 21 July 1927 whereby the Civil Court of Strasbourg, in *Société Audiffren-Singrün v. Liquidation Morlang, Binger et Société Atlas*, rejected a claim based on the French text of Article 311 of the Treaty of Versailles, having relied on the English which it held to be the language in which the chapter containing that article was drafted during the preparatory discussions (*Journal du droit international* (1928), p. 734).

³ P.C.I.J., Series A/B, No. 50, pp. 378-9. See also *ibid.*, Series C, No. 60, pp. 15 et seq., and pp. 37-40. It should also be noted that an entire sentence is missing from the French text of the report,

Miss Smith had drawn up the report in English, the English text was a more accurate expression of the Committee's opinions despite the officially bilingual character of the document; the language used for the *submission* of the report could only have influenced the Conference which was required to take a decision thereon, and this consideration was of no concern to the Court.

B. *Value of the original text as evidence*

If a study of the preparatory work dispels all doubt as to the original text of the disputed provision or if the presumptions drawn from the texts are sufficiently strong to convince the judge on that point, the next question is whether that text may properly be used in an attempt to ascertain the intention of the parties. In other words, how cogent is the evidence contained in the original text for purposes of interpretation?

The common intention of the parties, which it is the primary purpose of interpretation to ascertain, is a changeable notion; this is not the place to analyse it, but it can be briefly described, in a purely pragmatic manner, by saying that it originates in the conflicting claims or partially concordant wishes of the parties, transforms itself during the negotiations and assumes final form in the wording of the instrument adopted; in one exceptional case, namely where there is a *de facto* revision of a treaty, it may evolve even afterwards. But leaving this exceptional case aside, it is agreed that for purposes of interpretation the 'critical moment' is the moment of the conclusion of the treaty.¹ To that extent—and to that extent only—it can be said that all the incidents of the negotiation—initial proposals, counter-proposals, amendments, sub-amendments, declarations pertaining to interpretation, and the like—merge in the final text (the merger theory). But it does not follow that that text always and necessarily expresses the common intention of the parties at the time of signature. The authority attaching to the text does not derive from its intrinsic superiority but from the fact that it marks the moment of the conclusion of the treaty and that there is a presumption, for that very reason, that the negotiators drew it up with a full knowledge of the facts and all the necessary care, using the appropriate words in the knowledge that the instrument would be interpreted and applied. They may, however, have expressed themselves badly or failed, through inadvertence, to say what seemed to them obvious. Accordingly, strong as it is, the presumption in favour of the text is *always* rebuttable. In principle, it can be rebutted by any form of evidence that may be available, including a study of the successive phases in the preparation of the

as was pointed out by Sir Cecil Hurst in a question put to Counsel for the British Government at the first public hearing of 14 October 1932 (*ibid.*, pp. 226-7).

¹ See on this subject the cases cited in Schwarzenberger, *International Law* (3rd ed., 1957), vol. 1, p. 490, n. 12.

instrument; and nothing could be more arbitrary than the automatic rejection of the preparatory work on the pretext that it is rarely conclusive and often gives rise to abuse.

This being so, the question whether reference may lawfully be made to the original text in the interpretation of plurilingual treaties no longer raises, at least in theory, any special difficulties. By concluding such a treaty without specifying which text would be authoritative or, *a fortiori*, with an *ad hoc* stipulation that the different versions would all carry the same weight, the parties have signified, at the time of the conclusion of the treaty, their common wish that all the texts should be applied concurrently. In order to give effect to that wish, the judge must endeavour to conciliate the different versions, and it has been shown that that has been, indeed, his principal concern. But the common wish itself rests on the conviction that all the texts are, if not equivalent, at least compatible, for the parties can never be said to have intended to arrive at contradictory results. If the texts prove incompatible, it must be supposed that, as far as the provision in question is concerned, the parties made a mistake as to the equivalence of the texts and erroneously conferred the same authority on them all. The common intention of the parties at the time of the conclusion may in principle be established by any means available, but first and foremost, for the reasons stated above, on the basis of the texts themselves: the fact that one text is defective on a given point is not enough to justify the automatic rejection of all the texts. A choice must then be made between incompatible texts; and it is only normal that the presumption should be in favour of the original version, because that was the basis on which the negotiators in fact first reached agreement and the authoritative value of the other texts is subordinated to their equivalence to the original. The strength of the presumption in favour of the original version depends on the circumstances in which the other versions were drawn up. It will be weak if the negotiators all participated directly in the elaboration of those texts; stronger if they only exercised partial control over it, as, for example, by entrusting the task to a small drafting committee; and decisive if they left the entire job of drawing up those texts to one of the parties or to some specified body. Since the drafting process may assume any one of many varied forms, the evidential value of the original text tends to depend on the facts of each case; and only a study of the preparatory work, in the widest sense of that expression, will enable the judge to appraise it in each particular instance.

Such reference to the preparatory work does not make the judge's task any lighter. Moreover, the notion of incompatibility is liable to raise practical difficulties: where does a mere divergence end and incompatibility begin? Up to what point should the effort at conciliation be continued? The judge has a wide power of appreciation in this matter and, when in doubt, he may

concurrently resort, as did Umpire Ralston in the *Guastini* case, both to the conciliation method and to the method of referring to the original text, although the two derive—as has been stated above—from contradictory principles: on the one hand, the equality of the texts, on the other, the superiority of the original.¹

III. *EX OFFICIO* RECTIFICATION OF THE DEFECTIVE TEXT

When the divergence between the texts is clearly due to the negligence of the draughtsmen and the meaning of the provision in question is not in doubt, international tribunals do not hesitate to correct the defective text on their own initiative. This expedient is based on the maxim *falsa demonstratio non nocet*.² The International Court³ uses it, *inter alia*, in order to eliminate all discrepancies of form which may exist between the different versions of an originating application or request for advisory opinion.⁴ This determination to begin with perfectly parallel texts can be seen, for example, in Advisory Opinion No. 13 of the Permanent Court (*Competence of the I.L.O. to Regulate the Personal Work of the Employer*). By a resolution of 17 March 1926 the Council of the League of Nations had, at the request of the Governing Body of the I.L.O., asked the Court to give an advisory opinion on the following question:

English text

Is it within the competence of the International Labour Organization to draw up and to propose labour legislation which, in order to protect certain classes of workers, also regulates incidentally the same work when performed by the employer himself?

French text

L'Organisation internationale du Travail a-t-elle compétence pour élaborer et proposer une réglementation qui, pour assurer la protection de certains travailleurs salariés, vise en même temps et accessoirement le même travail personnel du patron?

The question had appeared, thus worded, in a resolution of the I.L.O. Governing Body, to which resolution the League of Nations Council had

¹ A combination of the two methods can be readily discerned in the Advisory Opinion of the International Court of Justice on the *Constitution of the Maritime Safety Committee of I.M.C.O.* In its survey of the preparatory work relating to Article 28 (a) of the Convention on I.M.C.O. of 6 March 1948, the Court made a point of the 'original English text' of the first draft of the article (*I.C.J. Reports*, 1960, p. 161); later, after recalling that the French and Spanish texts of the instrument were equally authentic, it based itself on a joint construction of the three authoritative texts of Articles 28 (a) and 60 (*ibid.*, pp. 167–8). Cf. also the passage of the Judgment relating to the *Mavrommatis Palestine Concessions* in which the Permanent Court of International Justice made use of the French text of the Palestine Mandate, although it had admitted that the same was probably a translation (see above, p. 81, n. 2).

² See Schwarzenberger, *International Law* (3rd ed., 1957), vol. 1, pp. 526–7, and Cheng, *General Principles of Law*, p. 118.

³ This expression covers both the Permanent Court of International Justice and the International Court of Justice, without distinction.

⁴ On the very wide power of the International Court to correct defects of form which may appear in the submissions of the parties or in requests for an advisory opinion, see Lauterpacht, *The Development of International Law by the International Court*, pp. 206–10.

merely referred after having quoted it verbatim. That resolution had been proposed by E. Mahaim who, as far as the wording was concerned, had confined himself to reproducing an earlier proposal by A. Fontaine.¹ Consequently, the question put to the Court had probably been drafted in French and translated into English by the I.L.O., but it formed part of a bilingual resolution of the I.L.O. Governing Body reproduced in a further resolution, also bilingual, of the League of Nations Council. The two texts are very clear and had given rise to no controversy; while it is true that 'workers' is wider than *travailleurs salariés*, the context makes it obvious that the word refers only to wage-earners. In its Advisory Opinion, however, the Court expressly found that the word 'workers' had been used for 'wage-earners', adding: 'this is in accordance with the sense of the English text and also with the language of the French text'.²

A fortiori, the International Court does not hesitate to rectify an incorrect text on its own initiative when the divergence between the texts is due to the fact that the authors have not faithfully reproduced, in one of the texts, the terms of an instrument to which they wished to refer. In its request for an advisory opinion regarding the *Nationality Decrees issued in Tunis and Morocco*, the League of Nations Council requested the Permanent Court to say whether the dispute between France and Great Britain as to those Decrees was 'by international law solely a matter of domestic jurisdiction (Article 15, paragraph 8, of the Covenant)' [*d'après le droit international, une affaire exclusivement d'ordre intérieur (article 15, paragraphe 8, du Pacte)*]. In its Advisory Opinion of 7 February 1923, the Court found that the English and French texts of the request differed slightly in wording as between themselves and also from the French and English texts of paragraph 8 of Article 15 of the Covenant, which also did not exactly correspond, and it relied on the two texts of the Covenant after having stated that, in the case under consideration, the various texts had to be regarded as having the same meaning.³ The Judgment of the Permanent Court in the case of the *Interpretation of the Statute of the Memel Territory* offers another example. The applicant Powers had requested the Court, among other things, to decide whether the dissolution of the Memel 'Diet' (*Chambre des Représentants*) carried out on 22 March 1932 had been in order. Since the

¹ For the history of the text, see the extracts of the minutes of the 30th session of the I.L.O. Governing Body reproduced in *P.C.I.J.*, Series C, No. 12, pp. 127-36.

² *Ibid.*, Series B, No. 13, p. 13. In its Advisory Opinion on the *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South-West Africa*, the International Court of Justice also noted a slight difference between the English and French texts of the request for an advisory opinion contained in a General Assembly resolution and found that the French text expressed the General Assembly's intention with greater accuracy; it therefore took the French version as the basis, but without finding it necessary to correct the English text accordingly (*I.C.J. Reports*, 1955, p. 72).

³ *P.C.I.J.*, Series B, No. 4, pp. 21-22.

legislative authority of the territory was called 'Chamber of Representatives' in the official English text of the Statute, the Court thought it necessary to point out in its Judgment that the French text of the question showed that by the word 'Diet' in the English text was meant the 'Chamber of Representatives'.¹

IV. DECISION WITHOUT INTERPRETATION

When the different texts of a plurilingual treaty are clear, the judge may on occasions, even if the texts do not concord, start from the assumption that all the versions are correct, apply each of them separately and successively and thus give his decision without ruling on the intention of the parties. For example, if a treaty makes the validity of an act subject to certain conditions which vary from one text to another, the act will necessarily be valid if it satisfies simultaneously the conditions specified in each of the versions.

The Anglo-German Mixed Arbitral Tribunal seems to have followed this method in *Leader, Plunkett and Leader v. Dr. Karl Heye*. Having been called upon to decide whether the defendant was a debtor within the meaning of paragraph 4 of the Annex to Section III of Part X of the Treaty of Versailles, it cited the English and French texts of the relevant provision and concluded:

'... the Tribunal holds that ... Dr. Heye was in a juridical condition comprised within the scope of the words "en faillite, en déconfiture ou en état d'insolvabilité déclarée" and that he was within the scope of the intended meaning of the corresponding English words used in the Treaty: "in a state of bankruptcy or failure or had given formal indication of insolvency".'²

The Supreme Prize Court of Berlin used a similar method in the *Indian Prince* case. The plaintiffs had claimed damages for loss of American goods carried on board an English steamer sunk by a German warship in 1914; they relied, *inter alia*, on Article XIII of the Treaty of Amity and Commerce concluded, on 11 July 1799, in French and English, between Prussia and the United States;³ that article read as follows:

English text

And in the same case of one of the Contracting Parties being engaged in War with any other Power, to prevent all the

French text

Dans le cas où l'une des Parties Contractantes se trouverait en guerre avec une autre Puissance, il a été convenu que

¹ *P.C.I.J.*, Series A/B, No. 49, p. 333.

² *T.A.M.*, *Recueil des décisions*, vol. 6, pp. 80-81.

³ Miller, *Treaties and Other International Acts of the United States of America*, vol. 2, p. 442. That article had been revived under Article XII of the Treaty of Commerce and Navigation of 1 May 1828 (*ibid.*, vol. 3, pp. 435-6); in the final clauses of the latter Treaty, it was said that the instrument had been signed 'both in the French and English languages' but that 'the signing in both languages shall not be brought into precedent, nor in any way operate to the prejudice of either Party' (*ibid.*, p. 439, and note by Miller on p. 440).

difficulties . . . that usually arise respecting merchandize of contraband, such as arms, ammunition, . . . no such articles, carried in the vessels, or by the subjects or citizens of either party to the enemies of the other, shall be deemed contraband . . .

pour prévenir les difficultés . . . qui surviennent ordinairement par rapport aux marchandises de contrebande, telles que armes et munitions . . . , aucun de ces articles, chargés à bord des vaisseaux des Sujets ou Citoyens de l'une des Parties, et destinés pour l'ennemi de l'autre, ne sera censé contrebande . . .

The plaintiffs conceded that the French text of the article did not support their claims because it referred only to goods carried in ships belonging to nationals of one of the parties; they relied on the English text, from which they contended that it could be deduced that compensation was due as long as the merchandise itself belonged to nationals of one of the parties ('carried . . . by the subjects or citizens of either party'). In its Judgment of 17 February 1916, the Court did not deem it necessary to seek to ascertain which text was authoritative or how to get over the contradiction if both texts had the same authority. It confined itself to showing that, correctly interpreted, the English text itself did not justify a finding in favour of the plaintiffs.¹

The expedient adopted in the above cases pertains to judicial logic rather than to the interpretation of treaties.² It may, in certain circumstances, furnish the court with the means to arrive at its decision, but leaves unanswered the question of the meaning to be given to the provision under consideration.

V. AUTHENTIC INTERPRETATION

Instead of himself solving the problem created by a divergence between the texts of a treaty, the judge called upon to apply the instrument may ask the parties to interpret the disputed provision themselves. If the parties accede to that request, their interpretation will be as binding on the tribunal as if it had been written into the body of the instrument. An authentic interpretation may assume any form, provided that the agreement of the parties is clearly apparent.

On 15 January 1880 the United States and France had concluded at Washington, in French and in English, a Convention relating to the settlement of certain claims arising out of war damage; Article I of that Convention read as follows:³

¹ Fauchille and De Visscher, *Jurisprudence allemande en matière de prises maritimes*, pp. 72-73. Recourse to a similar method is implicit in paragraph 17 of the *Lake Lanoux* arbitral award of 16 November 1957 between Spain and France (*Revue générale de droit international public*, 62 (1958), pp. 110-11; *International Law Reports*, 1957, pp. 132-3).

² Cf. above, pp. 77 et seq.

³ *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers, 1776-1909*, vol. 1, p. 536 (English text); Martens, *N.R.G.*, 2nd Series, vol. 6, pp. 493-4 (French text).

English text

All claims on the part of . . . citizens of the United States, upon the Government of France, arising out of acts committed . . . by the French civil or military authorities, upon the high seas or within the territory of France, its colonies and dependencies . . .; and on the other hand, all claims on the part of . . . citizens of France, upon the Government of the United States, arising out of acts committed . . . by the civil or military authorities of the Government of the United States, upon the high seas or within the territorial jurisdiction of the United States . . . shall be referred to three Commissioners. . . .

French text

Toutes les réclamations élevées par des . . . citoyens des Etats-Unis, contre le Gouvernement français, et résultant d'actes commis en haute mer ou sur le territoire de la France, de ses colonies et dépendances, . . . par les autorités civiles ou militaires françaises . . ., et d'autre part, toutes les réclamations élevées par des . . . citoyens français, contre le Gouvernement des Etats-Unis, et fondées sur des actes commis en haute mer ou sur le territoire des Etats-Unis . . . par les autorités civiles ou militaires du Gouvernement des Etats-Unis . . . seront soumises à trois commissaires. . . .

In *Chourreau v. United States*, the Commission thus established had to rule on a claim relating to acts committed by the military authorities of the United States, during the war between the States, in a theatre of operations. Counsel for the United States contended that the claim should not be entertained because the place where the acts had been committed was not within the 'territorial jurisdiction' of the United States, which had extended only to the part of the territory under the effective control of the Government. After the Commission had accepted that argument, Counsel for France protested against the decision; he demurred on the grounds that the French text of the applicable clause used the word *territoire*, and asked the Commission to submit the question of the divergence between the texts to the two Governments. The Commission granted that request and Secretary of State Frelinghuysen, after the question had been presented both by the American Commissioner and by the Minister of France at Washington, and after he had considered the texts of the Convention and the preparatory negotiations, declared that the expression 'territorial jurisdiction' should have been taken to mean 'territory' and that, so far as it rested on a distinction between those two expressions, the decision given in the *Chourreau* case failed to carry out the purpose of the contracting parties and should be corrected.¹ Since the Minister of France at Washington had been the French plenipotentiary at the conclusion of the Convention and the Secretary of State adopted the French Counsel's point of view, that declaration bore all the features of an authentic interpretation. Whether or not it was confirmed by other documents, it expressed without any doubt the common opinion of the two Governments.²

¹ Moore, *International Arbitrations*, vol. 2, pp. 1145-6 and 1168-9.

² In a memorandum reproduced by Moore (*ibid.*, p. 1168), the Commission had referred to a 'decision' of the Governments without specifying what document it had in mind.

The authentic interpretation of plurilingual treaties, an essentially legislative procedure, is relatively rare. For, aside from the fact that the interpretation of international instruments is normally within the competence of the judicial or arbitral bodies called upon to apply them, each contracting State will naturally, once the document has been signed, seek to rely on the text which seems to it the most favourable. In this connexion, it is interesting to recall the principal laborious stages of the conclusion of the Treaty of Washington of 18 December 1913, signed in English and Dutch by the United States and the Netherlands. By that Treaty, the two contracting States had introduced a system of inquiry which applied to all disputes according to the English text and only to future disputes according to the Dutch. That divergence between the texts caused the deferment until 1928 of the exchange of instruments of ratification. In 1925 Secretary of State Hughes refused to conclude a Protocol of interpretation and defined the respective value of the two texts as follows:

‘When a treaty is executed in more than one language, each document is to be regarded as an original, and the sense of the agreement should be drawn from the two texts collectively. Thus, if one is ambiguous, either party may turn to the other text for guidance if it reveals the common design. In the present case, the Dutch text fulfils this function, and may be said to govern both parties; for it is explicit and refers to disputes arising in the future in so many words, thereby indicating conclusively the relatively narrow significance to be attached to the words “all disputes” contained in the English text. The Dutch text must, under the circumstances, be deemed to point to the limits of the undertakings of both Contracting Parties which either may stand upon or invoke. I am of the opinion, therefore, that I could not sign the proposed Protocol without going beyond what either Party might fairly assert to be the exact limits of the treaty.’

On 13 February 1928, however, the two Governments signed a declaration whereby they interpreted the disputed clause in accordance with the English text, and the instruments of ratification of the Treaty were exchanged on 10 March 1928.¹

VI. OTHER METHODS

Some authorities have suggested that divergences between authentic texts should be solved by relying on the text drawn up in the language used by the court or tribunal; others have recommended the adoption of the text most favourable to the party which has assumed the obligation under the treaty; others, again, give preference to the text drawn up in the language of the State to which the provision under consideration relates; and finally, it has been argued that each contracting party is only bound by the

¹ Hackworth, *Digest of International Law*, vol. 5, pp. 265-6; *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers, 1923-1937*, vol. 4, pp. 4504-6.

text drawn up in its own language or by the text which it has ratified. The question, therefore, is whether the case law of international tribunals has sanctioned the use of these expedients. It will also be shown, by way of information, that national courts called upon to apply international treaties sometimes follow, in solving such discrepancies, rules of interpretation which govern municipal statutes.

A. Supremacy of the text drawn up in the language of the court or tribunal

Under paragraph 2 (a) of the Annex to Section V of Part X of the Treaty of Versailles, the dissolution envisaged in Article 299 of the Treaty was not to apply to contracts for the transfer of real or personal property, when ownership therein had been transferred 'or the object had been delivered before the parties became enemies' (*ou [que] l'objet [aurait été] livré avant que les parties ne [fussent] devenues ennemies*). In *E. Luttges and Co. v. Ormiston and Glass Ltd.*, the Anglo-German Mixed Arbitral Tribunal decided that the word 'delivery' ('delivered') should be interpreted 'according to the English conception of that term', i.e. as a transfer of possession.¹ But did it mean thereby that it had to apply the English version because English was the language of the tribunal, or did it simply wish to say that, for reasons not stated, the disputed word had to be taken in the sense accepted in English law? Another decision of the same Tribunal shows that the second interpretation seems the more likely. In *George Birrell Livingston and Edward Irving Findlay v. William Graaf*, the Tribunal had to interpret the words '[debt barred] by the laws of prescription in force in the country of the debtor' (*[dette prescrite] selon la législation du pays du débiteur*), words appearing in paragraph 4 of the Annex to Section III of Part X of the Treaty of Versailles. The German Government agent, relying on the French text, contended that those words referred only to the statute law governing prescription in the country of the debtor. The British Government agent, on the other hand, argued that they applied to all laws, domestic or foreign, which would be enforced in the matter of prescription by the courts of the debtor's country. The British agent based himself on the English text, which he considered clear, and argued that the French wording of the Treaty of Versailles could only be cited before the Anglo-German Mixed Arbitral Tribunal if the English wording was doubtful; but it is uncertain whether he was suggesting that the English text should prevail because English was the language of the Tribunal or because it was the language of Great Britain, a contracting party. In any event, the Tribunal adopted the British agent's interpretation; but it rejected by implication his argument

¹ T.A.M., *Recueil des décisions*, vol. 6, p. 570.

that the English text must prevail as, far from dismissing without further ado the interpretation based on the French text, it analysed the latter at length and showed that inadmissible consequences would flow therefrom.¹ Thus the text drawn up in the language used in the proceedings does not enjoy any special status. At most it can be said that, very often, the major reliance is placed upon it in practice so long as no discrepancy is brought to the tribunal's attention.²

B. *Supremacy of the text favourable to the obligor*

Several learned authors are of the opinion that conflicts between authentic texts should be solved in favour of the party which has assumed the undertaking. Cavaré, for example, believes that in the event of divergence between two texts deemed authoritative, the judge should adopt the interpretation more favourable to the debtor (*la plus favorable au débiteur*).³ Castberg, for his part, writes that if the two texts of a bilingual treaty are both rational, but not identical, the version to be adopted is that which imposes the lesser obligations on the parties (*qui impose les moindres obligations aux parties*).⁴ According to Redslob, too, the interpreter must take into account all the authentic texts but, in case of incompatibility, give precedence to the one involving *la moindre obligation*.⁵

The question is whether the jurisprudence of international tribunals tends to confirm these doctrinal views. In *Naomi Russell (United States) v. Mexico*, considered above, the President of the Special Mexican-United States Claims Commission did not take up the argument of the Mexican Commissioner according to which, if the English text of the disputed passage was ambiguous, the proper interpretation was the one more favourable to the party that was bound (i.e. in accordance with the Spanish version), particularly as it had entered into its undertaking *ex gratia*.⁶ By contrast, in the *Guastini* case, Umpire Ralston was inclined to prefer, in case of doubt, the construction favourable to the obligated party,⁷ while the Italian Commissioner preferred to adopt in such a case the interpretation favourable to the injured interests.⁸ Similarly, Arbitrator Beichmann declared, in the case of the *German Reparations under Article 260 of the Treaty of Versailles*:

'S'il y avait deux textes également clairs mais qui ne se [*sic*] concordaient pas entre eux, on pourrait soutenir que le texte qui comportait le moins d'obligations pour la partie obligée mériterait la préférence.'⁹

¹ Ibid., pp. 547-9.

² See below, pp. 139 et seq.

³ *Le Droit international public positif*, 2 (1951), p. 97.

⁴ 'La méthodologie du droit international public', *Recueil des cours*, 43 (1933—I), p. 333.

⁵ *Traité de droit des gens* (1950), p. 95.

⁶ See above, pp. 86-87.

⁷ See above, pp. 101-2.

⁸ Ralston, *Venezuelan Arbitrations of 1903*, p. 738.

⁹ See above, pp. 83-85.

In like circumstances, the Permanent Court ruled along the same lines. According to the French Government, the competence of the I.L.O. was limited to the regulation of industrial work and could not be extended to agriculture by interpretation, since conventions curtailing State sovereignty must be construed restrictively. In its Advisory Opinion No. 2, the Court did not dispute the validity of that principle but specified that the question must in every case resolve itself into what the terms of the Treaty actually meant.¹

These precedents clearly show the existence and, above all, the limits of the rule that, in the event of divergence between the texts, the judge must apply the one favourable to the party that is bound. Umpire Ralston, Arbitrator Beichmann and the Permanent Court all, explicitly or implicitly, admitted the existence of the rule, but did not in fact apply it because the divergence was only superficial or the problem could be solved by other means. It would thus seem that the rule—apart from being somewhat arbitrary—only comes into play in the last resort, when the intention of the contracting parties remains doubtful despite all the efforts of the judge, and, since the expedients available for solving problems of divergence between authentic texts are many and varied, as has been shown in this chapter, its importance is theoretical rather than practical. The obligor will nevertheless always be tempted to seek a contradiction between the texts, in order to be able to claim the application of the version more advantageous to his case.² In the case of the *German Reparations under Article 260 of the Treaty of Versailles*, for example, it may seem surprising that, faced with a perfectly clear English text the meaning of which it seems not to have disputed, the German Government sought to place on the French version exactly the opposite construction; there is every reason to believe that it was trying to create doubt in the Arbitrator's mind in order to be able to benefit subsequently from the application of the version less burdensome for the obligor—a principle which the Arbitrator in fact seemed prepared to accept, as the above-cited excerpt from the decision shows—and only failed to carry the day because it was unable to place its construction of the French version on a sufficiently solid foundation to invest both texts with comparable weight. But international tribunals have shown, by the very number of expedients to which they resort in order to ascertain the will of the contracting parties behind the texts, how vigorously they will resist such deliberate 'obscurantism'. Moreover, the rule in question does not, strictly speaking, pertain to the construction of treaties; it enables the

¹ See above, pp. 92-93.

² Mezger went so far as to say, regarding the Treaty of Versailles, that in certain cases a discrepancy in meaning between the two authentic versions could have the effect of nullifying an undertaking entered into by Germany (*Die Auslegung des Versailler Vertrages* (Berlin, 1926), p. 49).

tribunal to arrive at its decision despite the divergence between the texts but, far from carrying into effect the intention of the contracting parties, it implies—and that is precisely its *raison d'être*—that they were never *ad idem*.

C. *Supremacy of the text drawn up in the language of the State to which the provision under consideration refers*

Where a word has a different juridical meaning in one contracting State from that which it has in the other, it must be construed, according to Fiore in his *Diritto internazionale codificato*,¹ according to its meaning in the State to which the provision of the treaty refers. It was shown above that in the *Guastini* case, the Italian member of the Mixed Commission established pursuant to the Italian-Venezuelan Protocol of 13 February 1903 relied on this rule—if such a rule exists—in contending that a discrepancy between the English text ('...injury...') and the Italian text ('...*danni*...') of the second paragraph of Article IV of that Protocol had to be resolved in favour of the Italian version.² He applied it, however, in a somewhat curious manner. This rule apparently covers the case of a word used in two countries, i.e. the case of two countries using the same word (either in the same language, as 'equity' in England and the United States, or in two different languages, as 'tribunal' and *tribunal* in England and in France) or possibly two similar words (*équité* in France and 'equity' in England). The Italian Commissioner extended the rule to apply to two different words ('injury', '*danno*'), and that extension is in itself proper because it matters little whether the same or different words are used to express different ideas. But the reasoning which he introduced to make the rule operate in Italy's favour, though subtle, was certainly specious. He said, in effect, that the Commission had before it an English text and an Italian text; but Great Britain and the United States were not parties to the Protocol, and English had only been used as an auxiliary language; the State 'to which the provision referred' could therefore only be Italy, and the Italian text had to be followed. That amounted to saying that Fiore's rule had to operate in favour of Italy because, in the absence of a Spanish text, Venezuela could not—and that was indeed true—rely thereon. The rule presupposes, in the case of a bilingual treaty, that the two languages used are those of the two contracting States; when one of those languages is that of a third State, there is nothing to prevent the rule's application in favour of the one contracting State whose language has been used, provided always that it is established—as the Italian Commissioner omitted to do—that that State is indeed the

¹ 3rd ed., p. 310; see also *Trattato di diritto internazionale pubblico* (4th ed.), p. 334.

² See above, pp. 101-2.

one 'to which the provision of the treaty refers', or in other words, it would appear, the State most directly concerned with the provision, for example because it is required to carry that provision into effect.¹ This still leaves unanswered, however, the central question whether judicial decisions confirm Fiore's rule. It would seem that the only authority that can be invoked in support thereof, at least as far as plurilingual treaties are concerned, is the passage of the Judgment concerning the *Mavrommatis Palestine Concessions* where the Permanent Court said that the choice of the English version of the Palestine Mandate was indicated 'with especial force because the question concerns an instrument laying down the obligations of Great Britain in her capacity as Mandatory for Palestine . . .'. Although the meaning of this passage is far from clear, the Court apparently wished to say, as has already been stated, that the English text must prevail because it was up to Great Britain to apply the Mandate; Great Britain was the State, to use Fiore's words, to which the provision under consideration referred; it can also be said, after Rivier and Judge Moore, that it was Great Britain who was 'bound', provided that expression is taken in its widest sense, without any distinction between the duties and rights stipulated in the Mandate, since the provision under consideration deals with rights.² Thus defined, Fiore's rule is neither arbitrary nor devoid of practical interest. But the precedent in the *Mavrommatis* case is too uncertain to justify the assertion that the rule is consistent with judicial practice. Moreover, while the holder of a League of Nations Mandate was immediately discernible as the party directly concerned, it often happens, in the case of treaties *stricto sensu*, that the provision refers to all the contracting States equally.

D. *Is each party bound only by the text drawn up in its own language?*

In a letter of 20 December 1901 addressed to the Minister of the United States in Spain,³ Secretary of State Hay mentioned the 'rule of international law' according to which each of the parties to a treaty drawn up in two languages has the right to rely on its own version for purposes of interpretation, unless there is an express stipulation that only one of the texts shall be authoritative.⁴ Several authors share this opinion. Accioly, for example, believes that each party is bound only by its own text.⁵ Oppenheim, for his part, also writes that when a treaty is concluded in two languages and there is a divergence of meaning between the two texts, each party is only bound,

¹ See the formulation given to the rule in the 4th and 5th editions of *Diritto internazionale codificato*, pp. 337 and 363 respectively.

² See above, pp. 78-79.

³ Cited by Crandall, *Treaties, their Making and Enforcement* (2nd ed., 1916), p. 389, n. 40.

⁴ This last expedient, according to the Secretary of State, is seldom employed and is, by its nature, offending to one or the other of the contracting parties.

⁵ *Tratado de direito internacional público* (2nd ed., 1956-7), vol. 1, p. 636.

unless otherwise provided, by the version drawn up in its own language; and he adds that a party cannot claim the benefit of the text drawn up in the language of the other party.¹ Wheaton is of the same opinion.² The decisions of international tribunals, however, do not confirm the existence of this alleged rule, which would also clash with the very notion of a contractual undertaking.³ Such an undertaking implies that the parties have reached agreement on a common subject-matter. If each party were bound solely by its own version, the agreement would subsist only as long as the versions concurred and would disappear at the slightest discrepancy. At most it can be said that, since the texts are presumed to agree, each party is justified in following its own version as long as the application of the treaty gives rise to no dispute between the parties.⁴

E. *Is each party bound only by the text which it has ratified?*

A doctrine similar to the one just considered can be found in the award of Arbitrator Borel in the case of the *Kronprins Gustaf Adolf*. In that case Sweden alleged that the United States had, in 1917 and 1918, detained two Swedish vessels at American ports in breach of the Treaties of 3 April 1783 and 4 July 1827, instruments concluded by the two countries in French. At the time of those occurrences, the first Treaty had expired, with the exception of certain articles which the 1827 Treaty had revived with *même force*

¹ *International Law* (8th ed., by Lauterpacht, 1955), vol. 1, pp. 956-7. This would seem one of the passages which the distinguished editor had left without substantial changes 'more out of piety than conviction' (this *Year Book*, 26 (1949), p. 49).

² *Elements of International Law* (6th ed., by Berriedale Keith, 1929), vol. 1, p. 525. This opinion dies hard; it is found in Starke, *An Introduction to International Law* (4th ed., 1958), p. 317. Its origin is uncertain. According to Hudson, it may perhaps be due to the influence of certain decisions of the English Courts (*The Permanent Court of International Justice, 1920-1942*, p. 649, n. 20). It is more likely, however, to be a vestige of early methods of concluding treaties. Erstwhile, when a bilingual treaty was concluded, it might happen that each contracting party would only receive one copy, signed by the other party and drawn up in the latter's language (see Bittner, *Die Lehre von den völkerrechtlichen Vertragsurkunden*, p. 194). Thus the Treaty of Peace of Sistow, concluded on 4 August 1791 between Austria and the Ottoman Empire, contained the following provision (Article XIV): 'Deux instruments originaux parfaitement conformes du présent traité, l'un en langue française dont on s'est servi pour la commodité, et l'autre en langue turque, seront signés, le premier, des deux ministres plénipotentiaires impériaux et royaux, et le second, des trois ministres plénipotentiaires ottomans, échangés l'un contre l'autre par l'entremise des ministres plénipotentiaires médiateurs, et envoyés respectivement aux deux hautes cours contractantes' (Martens, *Recueil de traités* (2nd ed.), vol. 5, p. 252). Sometimes the two parties received copies drawn up in both languages, but each would have signed only the version in its own language (see, for example, Article 17 of the Treaty of Commerce signed at Kuldja on 25 July 1851 between Russia and China: Martens, *N.R.G.*, vol. 17, second part, p. 180).

³ As Hudson rightly states: 'It seems accurate to say that in such cases [i.e. in cases of versions in two or more languages] the text of the instrument consists of the versions in all the languages. Frequently it is not stipulated that the version in one language shall prevail in case of difference, and where this is true all parties are clearly bound by all the versions' (*International Legislation*, vol. 5, p. x).

⁴ This is probably the real meaning of Article 6 of the Treaty of Peace, Amity and Commerce signed on 13 August 1862 at Tientsin between Portugal and China, which provides that the Treaty shall be written in Portuguese and Chinese, after having been duly compared, and that each nation shall use as its document the version written in its own language (Martens, op. cit., p. 207).

et valeur as if they had been *insérés textuellement* (Article XVII) in the latter. Among those was Article 17, the second sentence of which was worded as follows:

English text

Merchants, masters and owners of ships, seamen, people of all sorts, ships and vessels, and in general all merchandises and effects of one of the allies or their subjects, shall not be subject to any embargo nor detained in any of the countries, territories, islands, cities, towns, ports, rivers, or domains whatever, of the other ally, on account of any military expedition or any public or private purpose whatever, by seizure, by force, or by any such manner.

French text

Les Marchands, Patrons et Propriétaires des Navires, Matelots, gens de toute sorte, Vaisseaux et Bâtimens et en général aucunes marchandises ni aucuns effets de chacun des Alliés ou de leurs Sujets ne pourront être assujétis à aucun embargo, ni retenus dans aucun des Pays, Territoires, Isles, Villes, Places, Ports, Rivages ou Domaines quelconques de l'autre Allié, pour quelque expédition militaire, usage public ou particulier de qui que ce soit, par saisie, par force ou de quelque manière semblable.

During the proceedings, a dispute developed regarding the meaning of this clause. According to the United States Government, it referred to the exercise of the right of angary; the authors of the Treaty had used the word 'embargo' in the sense—commonly used in the eighteenth century—of 'requisition', and had then clarified their thinking by adding the words 'nor detained . . .'; the word *usage* in the French text showed that the act contemplated was not merely the detention of a vessel, for example, but its detention for use, in other words an act of requisitioning. The Arbitrator rejected that argument. In his view, there was no reason to suppose that the negotiators had not used the word 'embargo' in its ordinary sense or that they had used two expressions to convey the same idea; what they had wished to prohibit had been, on the one hand, an embargo in the strict sense and, on the other hand, any other form of 'detention', with or without use. The argument drawn from the French text the Arbitrator dismissed by ruling, in effect, that the English version—which was a translation—prevailed, a finding as surprising as the grounds on which it was based.

After recalling that the original of the 1783 Treaty had been in French, the Arbitrator cited, first, an extract from the *Journal of the United States Continental Congress* which stated that Congress had taken into consideration a Treaty . . . [followed the English translation],¹ and secondly, the following paragraph from the Presidential proclamation: 'Whereas the said treaty has been duly approved and ratified by the United States in Congress assembled and the translation thereof made in the following words, to wit. . . .' He concluded therefrom that the Treaty had been 'understood

¹ Even today, treaties submitted to the United States Senate in a foreign language are generally accompanied by an English translation made by the Department of State; the translation has no effects in international law (Hackworth, *Digest of International Law*, vol. 5, pp. 37-38).

and ratified by the United States as it stands in the English text' and added that the word 'purpose' could not have been due to any inadvertence on the part of Charles Thomson, Secretary of Congress, and the meticulous translator of the Treaty, the more so since the same word appeared in similar clauses of other treaties concluded by the United States.¹

This reasoning is not convincing. The statement that the United States had ratified the Treaty as it stood in the English text was incorrect. The instrument of ratification by the United States preserved in the Swedish archives contains only the French version.² And from the above paragraph of the Presidential proclamation—which runs counter to the Arbitrator's conclusions—it is clear that Congress had, at least in law, acted on the French original. It is possible that, in fact, Congress had considered only the English translation, as the extract from the *Journal* seems to indicate, and to that extent it could be said—assuming that Congress is the United States organ competent to interpret treaties—that the Treaty 'was understood . . . by the United States as it stands in the English text'. In any event, however, that could only have been an *ex parte* interpretation. And again, the fact that the disputed word in the English version had been deliberately inserted and that it appeared also in similar treaties—of a later date and concluded with other States—showed merely that it conveyed exactly the right meaning *in the opinion of the United States*. Would it be right to conclude that, in the Arbitrator's opinion, a State which has interpreted a treaty by translating it is bound by that interpretation and can no longer rely on the original? The laconic tone of the award casts no light on this point. And even supposing that, as the Arbitrator stated, the United States had in reality ratified only the English version, would that mean, in his opinion, that each State is bound by the text which it has ratified even if that text is only a translation prepared by its own officials? Such a doctrine—if it could be formulated—would be contrary to the very nature of treaties. Either the two parties have ratified the same text (or texts), which is binding on each of them, or they have ratified different versions and there is no treaty. As to the text used in actual fact by the State organs which took part in the ratification of the treaty, it has no international significance whatever.

F. *Application by national courts of rules of interpretation governing municipal statutes*

Domestic law at times provides national courts with rules of interpretation which enable them to solve discrepancies between authentic texts but which international courts would be unable to apply. In 1832, for example, in *United States v. Arredondo*, the United States Supreme Court had to

¹ United Nations, *Reports of International Arbitral Awards*, vol. 2, pp. 1256–9.

² Miller, *Treaties and other International Acts of the United States of America*, vol. 2, p. 149.

interpret Article 8 of the Treaty of Amity, Settlement and Limits concluded on 22 February 1819, in English and Spanish, between the United States and Spain; that article provided, among other things, that grants of land made by Spain in the territories ceded to the United States 'shall be ratified and confirmed to the persons in possession of the lands' (*quedarán ratificadas y reconocidas*); the question whether or not the validity of the concessions was subject to approval by the United States Congress therefore depended on whether the English or Spanish version was adopted. The Court expressed the following Opinion:

'... and thus considering the treaty in both languages, and each as is declared at its head, "original", the one version neither controls nor is to be preferred to the other; each expresses the meaning of the Contracting Parties, respectively, in their own language, as in the opinion of each, expressing and declaring the intention of both. If they are mistaken, and the words used do not and are not understood afterwards by the Parties to convey the same meaning in both languages; then, both being originals, and of equal authority, we must resort to some other mode than the inspection of the treaty to give it a proper construction. . . .'

Judging that it was necessary to seek the intention of the grantor—the King of Spain—in the version drawn up in his own language, the Court opted in favour of the Spanish version; it thus applied a rule of interpretation established by its own municipal law, as the words of the Judgment clearly demonstrate ('The King of Spain was the grantor; the treaty was his deed . . . The Spanish version was in his words and expressed his intention . . . The Court must be governed by the clearly expressed and manifest intention of the grantor and not the grantee in private, *a fortiori* in public, grants').¹

VII. EVIDENTIAL VALUE OF PUNCTUATION

If the divergence between the texts is one of punctuation, the question arises what weight must be attached to that detail for purposes of interpretation. The decisions of the Mixed Arbitral Tribunals contain many useful pointers in this regard. For example, the first sentence of Article 297 (e) of the Treaty of Versailles gave rise to several disputes before those tribunals. It was worded as follows:

English text

The nationals of Allied and Associated Powers shall be entitled to compensation

French text

Les ressortissants des Puissances alliées ou associées auront droit à une indemnité

¹ Moore, *International Law Digest*, vol. 5, p. 250; Yi-Ting Chang, *The interpretation of treaties by judicial tribunals*, pp. 153–4. In fact, since the terms of a treaty are the work of both parties, the responsibility for any discrepancy between the versions devolves on them both (Crandall, *Treaties, their Making and Enforcement* (2nd ed.), pp. 389–90). The following year, in *United States v. Percheman*, the Supreme Court endeavoured to reconcile the two texts by showing that the words 'shall be ratified and confirmed' might import that the land grants shall be so ratified and confirmed by force of the instrument itself and did not necessarily imply a future legislative act (Miller, *op. cit.*, vol. 3, pp. 58–59).

in respect of damage or injury inflicted upon their property, rights or interests, including any company or association in which they are interested, in German territory as it existed on August 1, 1914, by the application either of the exceptional war measures or measures of transfer mentioned in paragraphs 1 and 3 of the Annex hereto.

pour les dommages ou préjudices causés à leurs biens, droits ou intérêts, y compris les sociétés ou associations dans lesquelles ils étaient intéressés sur le territoire allemand, tel qu'il existait au 1^{er} août 1914, par l'application, tant des mesures exceptionnelles de guerre que des mesures de disposition qui font l'objet des paragraphes 1 et 3 de l'Annexe ci-jointe.

In *Société anonyme du Charbonnage Frédéric Henri v. German State*, the Franco-German Mixed Arbitral Tribunal interpreted this sentence as assimilating to allied nationals all companies in which those nationals were interested. In order to do that, it made the words 'including any company or association in which they are interested' relate to 'the nationals of Allied and Associated Powers'; and since in the French text the word *intéressés* was consequently separated from the words *sur le territoire allemand*, it pointed out that that word should have been followed, as in the English text, by a comma.¹ That interpretation derogated from the Treaty and led to the inadmissible result of giving to all German companies in which allied nationals held some interest, however small, the right to compensation by the German State. The German-Belgian Mixed Arbitral Tribunal rejected it for those very reasons, adding that the clumsy juxtaposition of 'company or association' with 'property, rights or interests' was explained by the fact that the words 'including any company or association in which they are interested' was a stereotyped formula found in many parts of the Treaty.²

Other disputes centred round the words 'in German territory'. According to some, including Lapradelle, those words only related to 'including any company . . . in which they are interested'. According to others, however, they governed the entire text from 'in respect of damage' until 'interested', so that the right to reparation was limited, both in the case of allied nationals and in the case of companies, to damage inflicted in German territory. The first interpretation was based on the French version, where there is no comma after the word *intéressés*. The Mixed Arbitral Tribunals adopted the second, for reasons which can be summarized as follows.

No importance should be attached to the absence of a comma in the French version, because the English version of the provision in question and the French version of the Treaty of Saint-Germain, Article 249 (e) of

¹ T.A.M., *Recueil des décisions*, vol. 1, p. 429.

² Ibid., vol. 4, pp. 331-2. See also German-Polish Mixed Arbitral Tribunal, *Hirschberg and Wilczynski . . . v. German State*, *ibid.*, vol. 5, pp. 928-9; and Roumanian-German Mixed Arbitral Tribunal, *Weitzenhoffer v. German State*, *ibid.*, pp. 937-45. In the last-named case, the plaintiff contended that in Article 298 the reference to a company or association related to *ressortissants* and not to *biens, droits et intérêts*; the Tribunal held that the French text lent itself to both interpretations, but that the English version demanded the second. The interpretation of the Franco-German Mixed Arbitral Tribunal seems to have had no further consequences.

which was more or less a repetition of Article 297 (e) of the Treaty of Versailles, both had one in the required place, and because certain judicious additions introduced in the Treaty of Saint-Germain to provisions borrowed from the Treaty of Versailles showed that the authors had made an effort to correct the imperfections of the latter; a comma was more commonly omitted through inadvertence than wrongly introduced; moreover, the words 'in German territory' could grammatically relate to the verb 'inflicted' even if there was no comma; the first interpretation would deprive allied nationals of the right to claim compensation for damage caused to the property of companies of neutral countries or of countries allied to Germany in which those nationals were interested, an intention which could never be attributed to the authors of the Treaty; in two parallel passages appearing, respectively, in paragraph 4 of the Annex to Section IV and in Article 297 (b), the context demanded, despite the absence of punctuation in the French text, the separation of the reference to German territory from the words preceding it, especially so, in the second of those passages, since the corresponding text of the Treaty of Saint-Germain was drawn in slightly different terms which eliminated all doubt; and finally, the context itself confirmed the second interpretation.¹ Thus, although it finally failed to sway the issue, the punctuation of one of the authentic texts was nevertheless, with respect to a vitally important question, the source of an arguable interpretation which the tribunals only rejected after considering all the features of the text and of the context and even certain wholly extrinsic elements. It remains true, however, that from the standpoint of interpretation punctuation carries much less weight as evidence than do the substantive elements of the text. This is primarily because it is not governed by

¹ German-Belgian Mixed Arbitral Tribunal, *Joseph Zurstrassen et Cie v. German State*, T.A.M., *Recueil des décisions*, vol. 4, pp. 330-3. See also Anglo-German M.A.T., *Weiss Biheller and Brooks Ltd. v. German State*, *ibid.*, vol. 1, pp. 852-3; German-Czechoslovak M.A.T., *Loy and Markus v. German State and Deutsch Ostafrikanische Bank A.G.* (the Tribunal noted that the first interpretation would be a wide one and could not therefore be adopted unless manifestly right, which was not the case), *ibid.*, vol. 3, pp. 1004-5; German-Polish M.A.T., *Hirschberg and Wilczynski . . . v. German State*, *ibid.*, vol. 5, pp. 926-30; and German-Italian M.A.T., *Ditta Isidoro Hess Soc. An. Manifattura di Rivarolo and San Giorgio Canavese v. German State*, and *Garda Enrico v. German State* (in this last-named case, the Tribunal noted that punctuation was not governed by strict rules and was generally of little value for purposes of construction), *ibid.*, pp. 182-3 and 915-16. The Mixed Arbitral Tribunals applied the same doctrine in the interpretation of the corresponding provisions of the Treaty of Saint-Germain (Article 249 (e)) and of the Treaty of Neuilly (Article 177 (e)). In the former, the good punctuation of the French text facilitated their task (see Italian-Austrian M.A.T., *Cacchi Valentino v. Austrian State*, *ibid.*, vol. 4, pp. 498-9). By contrast, in Article 177 (e) of the Treaty of Neuilly, there was a comma in the English and Italian texts, but not in the French; since the French was to prevail in case of divergence, the construction of that article was liable to be more delicate than that of Article 297 (e) of the Treaty of Versailles; in practice, however, the interpretation adopted for the Treaties of Versailles and of Saint-Germain almost inevitably had to be followed, if only by analogy; in *Ruta v. Bulgarian State* (*ibid.*, vol. 5, pp. 548-9) the Italian-Bulgarian Mixed Arbitral Tribunal adhered to that interpretation, but seems to have used a French text of the Treaty of Neuilly with the punctuation corrected; it added, at the same time, that punctuation alone, even if it had been uniform in the different texts, would not have sufficed to justify the contrary construction.

strict rules but, to a large extent, by subjective considerations and the taste of the period. If inadequate, it betrays a lack of culture; if excessive, it demonstrates a certain narrow-mindedness. But between these two extremes there are always several ways of punctuating a text correctly, and at all times some points may easily be omitted or inserted through carelessness in the act of transcribing.

CHAPTER II

DIVERGENCES BETWEEN TEXTS OF UNEQUAL AUTHORITY

The texts discussed in the first chapter had all been invested with equal authority; they were always authentic texts. In addition to the authentic versions, however, there may be others which the contracting States have signed but which are not authoritative. These have been called 'official' texts. The Treaty of Peace with Italy of 10 February 1947, for example, was 'done in the city of Paris in the French, English, Russian and Italian languages' (final clauses) but only the French, English and Russian texts are authentic (Article 90); the Italian text is official but not authentic. Similarly, the Treaties of Peace of 10 February 1947 with Bulgaria, Hungary, Roumania and Finland were signed in four versions (Russian, English, French and, as applicable, Bulgarian, Hungarian, Roumanian or Finnish) (final clauses), of which only two (Russian and English) are authentic (Articles 38, 42, 40 and 36 respectively); each of these treaties therefore has two versions which are official without being authentic, namely the French and, as applicable, the Bulgarian, Hungarian, Roumanian or Finnish versions. Besides the authentic and official versions of a treaty, there may also exist official translations drawn up by the contracting parties themselves, by an international body, or by a given contracting or non-contracting State. In principle, of course, authentic texts, official texts and official translations, respectively, represent three progressively decreasing levels of authority.¹

¹ One also finds, in exceptional cases, texts which the contracting parties have invested with a status *sui generis*. Thus the Convention for the Unification of Certain Rules concerning Collisions in Inland Navigation of 9 December 1930 was drawn up in French (Article 14), but a German text was attached thereto on Germany's request; the authority of that text was defined as follows: 'A text in the German language is joined to the present Convention. In signing the Convention, Plenipotentiaries may reserve for their Government the right to adopt this text when ratifying, it being understood that, if this is done, the said text shall be authoritative also in the relations between States which have all exercised the said right, and that, in case of dispute between such States as to the interpretation of the texts, the text of the Convention shall prevail if one of the States parties to or intervening in the dispute so demands' (Protocol-Annex, III) (Hudson, *International Legislation*, vol. 5, pp. 819 and 821-2). See 'Use of Languages other than English or French in Conventions concluded at Conferences convened by the League of Nations', in this *Year Book*, 13 (1932), pp. 135-6.

Consequently, there may be a discrepancy between texts of unequal authority. The question then arises whether every problem of interpretation resulting therefrom is automatically solved because the text which comes higher in the hierarchy must always prevail. Pointers to an answer must be sought in the case law of international tribunals and, as a subsidiary, of national courts. There are two possibilities of a discrepancy: first, between an authentic text and an official text, and secondly, between an authentic or official text and an official translation. And the principal problem to solve is, in the first case, what value to attach to an official text and, in the second, what value to place on an official translation. These two cases—which are not mutually exclusive, since the same treaty may have versions in each of the three categories—will be considered below.

I. DIVERGENCES BETWEEN AUTHENTIC TEXTS AND OFFICIAL TEXTS

The coexistence of authentic texts and official texts is always due to the fact that the treaty has been concluded in several versions, each in a different language, and that one or more of them have been declared authentic. The elements which will serve as the basis of interpretation are thus to be found in the treaty itself, generally in the final clauses which provide that the instrument has been drawn up in specified languages and that a specified version or versions shall be deemed authoritative. Consequently, the solution to be adopted in case of divergence between authentic texts and official texts is, in theory, a question of interpretation: the judge must determine, in each particular case, what was the intention of the parties on that point. In practice, however, the question is far from simple, for most final clauses have special characteristics which the interpreter must take into account. These clauses are usually borrowed from earlier instruments and are seldom the subject of exhaustive deliberation; moreover, they are more or less stereotyped and the words used therein have often lost their true meaning. The provisions must therefore generally be construed less on the basis of the text than in the light of diplomatic practice and, here as elsewhere, case law affords the surest guidance in the matter. Clauses relating to authentic and official texts and their interpretation by courts and tribunals will each be considered in their turn.

A. Clauses relating to authentic and official texts

The clauses considered here are those which, in a plurilingual treaty whereof only certain versions are authoritative, state, first, in what languages the instrument was drawn up and, secondly, which are those authentic

texts. It matters little whether these statements appear in a single provision (e.g. Treaties of Saint-Germain, Neuilly and Trianon) or in separate provisions (e.g. Treaties of Peace of 10 February 1947 with Italy, Bulgaria, Hungary, Roumania and Finland). The clauses stating the languages in which the instrument was done can present no difficulty of interpretation. This is sometimes not the case, however, with clauses relating to authenticity.

These clauses, which may assume a variety of forms, fall into two broad categories.

In clauses of the first category, it is simply stated that a given text shall be authentic and it follows, *a contrario*, that official texts must not enter into account for purposes of interpretation. Such clauses, examples of which can be found in Articles 90, 38, 42, 40 and 36, respectively, of the Treaties of Peace of 10 February 1947 with Italy, Bulgaria, Hungary, Roumania and Finland, can be construed without difficulty, despite the varied form that they may assume,¹ on the basis of the text itself.

In clauses of the second category, which are the most frequent, the supremacy of the authentic text is not absolute and unconditional but subject to certain reservations which vary from treaty to treaty. Most often, it is stipulated that a given text shall prevail *in case of divergence*. The first final clause of the Treaties of Saint-Germain, Neuilly and Trianon, for example, was worded as follows: 'The present Treaty, in French, in English, and in Italian, shall be ratified. In case of divergence, the French text shall prevail, . . . [except for Parts I and XIII].' That provision was designed to overcome the difficulties inherent in the absolute bilingualism which the authors of the peace treaties had adopted for the Treaty of Versailles. Interpreted literally, it meant that the three versions would be authoritative so far as they concorded, since the French text was to prevail only in case of divergence. The English and Italian versions were thus in reality more than merely official, being quasi-authentic or, in other words, invested with a relative authenticity; the French text, on the other hand, possessed the same authenticity and, in addition, an absolute authenticity in the event of divergence. In other words, the French text became authentic as soon as the others ceased to be so, and in order to determine that moment the applicable criterion was the presence of a divergence. This is where the

¹ See, for example, the Treaty of Amity and Commerce signed at Yedo on 29 July 1858 between the United States and Japan: ' . . . all the versions [i.e. the English, Japanese and Dutch versions] having the same meaning and intention, but the Dutch version shall be considered as being the original [i.e. the authentic version].' (Final clauses) (Martens, *N.R.G.*, vol. 17, first part, p. 58). It is noteworthy that the authentic text is sometimes drawn up after the official texts. For example, the third paragraph of Article 6 of the Treaty concerning the tariff autonomy of Persia, signed on 10 May 1928 at Teheran by Persia and the United Kingdom, is worded as follows: 'The present treaty has been drawn up in Persian and in English, pending the preparation of the French text, on which the two high contracting parties will agree as soon as possible and which will be authoritative' (*United Kingdom Treaty Series* (1935), No. 43, pp. 11 and 32).

difficulties tended to arise. If the criterion had been objective, the applicable text or texts would have been immediately ascertainable at all times. But, as was shown in the first chapter, the notion of divergence is essentially subjective. Save where there has been a patent error by the parties, a divergence is not readily apparent on the face of the treaty; before anyone can determine whether it affects the substance of the instrument it must be detected and duly appraised, which implies at the very least a careful comparison of the texts. Furthermore, in many cases, it is possible to eliminate the discrepancy and to reconcile the various texts by interpretation.¹ The question then arises whether, when a clause provides that a given text shall be deemed authoritative in case of divergence, the contracting parties really intended that the judge called upon to apply the treaty should at all times make certain that the different versions concord. If the answer is in the affirmative, how long should he sustain his effort to conciliate the texts before he can apply the version required to prevail in case of discrepancy? And is it up to the party to the dispute which is relying on that version to demonstrate that a discrepancy exists? These manifold questions cannot be answered solely on the basis of the final clauses. And yet, despite its academic appearance, this problem is of considerable practical interest. In connexion with the Treaty of Saint-Germain, some tried to solve the difficulty by evading it. So long as the texts agreed, they said, the French text necessarily had the same meaning as the others, and in case of divergence it prevailed over them; consequently, it was sufficient to apply the French text automatically.² That reasoning, however, was based on a false premiss, for the interpretation most compatible with three versions is not necessarily identical with that which must be placed on the authentic text alone; the first may be the result of a process of selection during which several possible meanings have been rejected as incompatible with one or other of the texts, while in the second the judge's power of appreciation is not hedged in within the limits imposed by the two less authoritative versions.

At times it even seems that the intention of the parties was to discourage any automatic recourse to the authentic text. This is particularly the case when, in a bilateral treaty, the contracting parties have designated as authentic a version drawn up in a third language. For example, the General Treaty and the Treaty of Extradition signed at Lausanne on 6 August 1923 between the United States and Turkey were drawn up in French, English and Turkish, the French text being deemed authentic in case of discrepancy (Articles XXXII and XII, respectively).³ Similarly, the Arbitration Treaty signed at Washington on 27 June 1930 between the United States

¹ See above, pp. 82 et seq. and 105-6.

² See below, p. 131.

³ *Foreign Relations of the United States* (1923), vol. 2, pp. 1166 and 1171.

and China was drawn up in English, Chinese and French; the English and Chinese versions were equally authoritative, but in case of divergence the French text prevailed (Article III).¹ When a bilateral treaty contains a clause of this kind, it would probably be going beyond the intention of the parties to apply automatically the text drawn up in the third language. Since that version is most often only a translation adopted as the authentic text in order to avoid any dispute without offending the susceptibilities of the contracting parties, the official texts drawn up in the languages of the parties should normally suffice for the application of the treaty. Nevertheless, when one of the official texts is, as in the above examples, drawn up in Chinese or Turkish, many an international judge would doubtless feel tempted to rely on the authentic text from the very outset. It may even be the case that the parties themselves have resorted to a third language because one—or both—of them was not conversant with the language of the other. On 14 May 1897, for example, Great Britain and Ethiopia concluded a frontier treaty drawn up in English and in Amharic, 'both texts being considered as official' (final clauses), but, since Emperor Menelik II had no interpreter available capable of comparing and checking the two texts, they annexed to the treaty a French translation which was to be deemed authoritative in case of dispute (Annex 2).² When the choice of an authentic text drawn up in a third language is prompted by such considerations, it is doubtful whether the parties were truly *ad idem* on the official versions and the judge will normally rely on the authentic text alone.

In the last example cited above, this conclusion seems particularly irresistible because the authentic text was to be deemed authoritative *in case of dispute*, so that it necessarily had to be relied upon immediately one of the parties contested a construction advanced by the other.³ Some similar clauses are even more explicit on this point. For example, Article 5 of the Treaty of Amity, Commerce and Navigation concluded between China and Prussia at Tientsin on 2 September 1861 is worded as follows:

'... Quant au présent traité, il sera expédié en langue Allemande, Chinoise et Française, dans le but d'éviter toute discussion ultérieure et par la raison que la

¹ *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers, 1923-1937*, vol. 4, p. 4022. This clause was adopted in order to give satisfaction to the National Government of the Republic of China, which adhered to the principle of demanding that the Chinese version of any treaty concluded with China must prevail unless it was stipulated that some third version would be authoritative (Hackworth, *Digest of International Law*, vol. 5, p. 38). This practice, however, was at the time recent, for Article II of the Treaty of Peking of 25 July 1928 concerning tariff relations between the two countries, drawn up in English and Chinese, provided that the two versions had been carefully compared and verified but that in case of divergence the English text would prevail (*ibid.*, p. 39).

² Hertslet, *The Map of Africa by Treaty* (3rd ed.), vol. 2, pp. 424 and 426-7.

³ See also Article XXIII of the Treaty of Amity, Commerce and Navigation signed at Yedo on 18 October 1869 between Austria-Hungary and Japan: '... All these versions [i.e. the Japanese, English and German] have the same meaning and intention, but in case of dispute the English text shall be considered as the original one' (Martens, *N.R.G.*, 2nd Series, vol. 2, p. 425).

langue Française est connue de tous les diplomates de l'Europe. Toutes ces expéditions ont le même sens et la même signification, mais le texte Français sera considéré comme le texte original du traité, de façon que, s'il y avait quelque part une interprétation différente du texte Allemand et du texte Chinois, l'expédition Française fera foi.¹

Similarly, Article 9 of the Convention between France and Siam of 7 October 1902 provides that:

'En cas de difficultés d'interprétation de la . . . Convention, rédigée en Français et en Siamois, le texte Français fera seul foi.'²

Since either party may always assert that a problem of interpretation exists, clauses of this kind are in fact analogous to those of the first category, where it is simply specified that a given text shall be authoritative.

Literally interpreted, therefore, the relevant final clauses on the whole give only a sketchy indication of the manner in which conflicts between authentic and official texts should be solved. The true scope of such clauses can only be measured in the light of judicial pronouncements.

B. Case law

Courts and tribunals take the special nature of final clauses into account and generally apply them without placing any explicit construction thereon; their decisions nevertheless contain some remarkable exceptions.

An attempt will now be made to ascertain, adhering to the distinction drawn above between clauses of the first and second category, how courts and tribunals interpret and, above all, apply those provisions.

(1) *Clauses of the first category*

When a clause of a treaty simply provides that a given version shall be authoritative, the judge naturally applies that version without taking any official text into account; if there are several authentic texts and they contain discrepancies, the expedients studied in the first chapter may be relied upon. Thus, in the *Flegenheimer* case, the Italian-United States Conciliation Commission rejected outright the Italian version of the Treaty of Peace with Italy of 10 February 1947, holding that a treaty can only be construed on the basis of authentic texts.³

(2) *Clauses of the second category*

It has been shown that clauses of the second category, in which the

¹ Martens, *N.R.G.*, vol. 19, p. 171. See also the Treaty of 7 February 1862 between Prussia and Siam, drawn up in German, Siamese and English, the last-named to prevail (Article 25) (*ibid.*, p. 225), as well as the Treaty of Friendship between Japan and Ethiopia signed at Addis Ababa on 19 December 1957 in Japanese, Amharic and French, the French text of which is to be deemed authentic *en cas de divergence d'interprétation* (Article VI) (*United Nations Treaty Series*, vol. 325, p. 100).

² Reinach, *Recueil des traités conclus par la France en Extrême-Orient (1684-1902)*, p. 441.

³ *Italian-United States Conciliation Commission*, case No. 20, decision No. 182, p. 74.

supremacy of the authentic text is subject to certain conditions, are hard to interpret on the basis of the text alone. The question, then, is how the courts have interpreted and applied them in practice. The case law in the matter stems principally from the Treaties of Saint-Germain, Neuilly and Trianon, which had been drawn up in French, English and Italian subject to the stipulation that the French text would prevail—except in Parts I and XIII—‘in case of divergence’ (final clauses). The relevant decisions reveal two distinct approaches.

In the first place, there are decisions based on a literal interpretation of the applicable final clauses.

In his Dissenting Opinion attached to the decision of the Hungarian-Serbian-Croatian-Slovenian Mixed Arbitral Tribunal in the *Archduke Frederick of Habsburg-Lorraine v. Serbian-Croatian-Slovenian State*, the Yugoslav Arbitrator held that the *biens privés de l'ancienne famille souveraine d'Autriche-Hongrie* acquired by the States successors to Austria-Hungary under the second paragraph of Article 191 of the Treaty of Trianon included, not only the undivided property of the former ruling family, but also the individual property of the members of that family. He relied, among other things, on the English text of the Treaty, which provided that the successor States would acquire ‘the private property of members of the former Royal Family of Austria-Hungary’; he pointed out that, since the financial clauses of the treaties of peace had been the work of English jurists, the English version of Article 191 was the original, as was further proved by the fact that the English version thereof and that of Article 208 of the Treaty of Saint-Germain were absolutely identical whereas there was a slight difference between the two French texts. The Arbitrator added, however, that the French version had exactly the same meaning as the English, which seems difficult to reconcile with the emphasis placed by him on the English text although the latter was not authentic.¹ Again, in a letter addressed to the President of the Tribunal, the Arbitrator had admitted that, under the final clauses, the French text was to prevail in case of divergence, but had also stressed that in the case under consideration there was no discrepancy, the English text merely being clearer.² The logic of this reasoning is not readily apparent. If there was no divergence and consequently the three texts of the provision in question were equally authoritative, why the need to invoke the English text and contend that it was the original?³ And why was there no mention whatever of the Italian

¹ T.A.M., *Recueil des décisions*, vol. 9, p. 390.

² *League of Nations Official Journal* (July 1929), p. 1040.

³ Regarding the determination of the original version, see above, pp. 98–104. The reasons given by the Arbitrator are not at all convincing. Even if the financial clauses of the peace treaties were on the whole the work of English jurists—which needed confirmation—it did not necessarily follow that the English text of a given article was the original. As to the comparison with Article 208 of the Treaty of Saint-Germain, the desired inference is somewhat obscure.

version? In reality, the Arbitrator did not rely on the three versions concurrently but on the English text alone, which would suggest that he only sought to establish concordance in order to reject the ordinary meaning of the French version. The Tribunal did not rule on the respective authority of the various versions, but the same problem of interpretation faced the Polish courts in connexion with the corresponding provisions of the Treaty of Saint-Germain.

In the *Archdukes of the Habsburg-Lorraine House v. The Polish State Treasury*, the plaintiffs had claimed the restitution of lands which the Polish State had acquired under Article 208 of the Treaty of Saint-Germain; they had contended that those lands were not *biens privés de l'ancienne famille souveraine d'Autriche-Hongrie* but property which they had held purely as individuals, and that according to the French text, which was to prevail in case of divergence, Article 208 had not envisaged the cession of such property. The District Court of Cieszyn agreed that there was an evident divergence between the French and English texts and that the French must prevail; it accordingly adjudged to the plaintiffs approximately 1,000 acres. The Court of Appeal of Katowice, however, held that, in spite of verbal differences, there was no divergence between the two texts, that it had not been proved that the English text was a translation of the French text, and that *biens privés de l'ancienne famille souveraine* might apply both to family property and to individual property acquired and held in connexion with the fact of belonging to the reigning family. That left the plaintiffs with only some 120 acres. The Supreme Court, in the final instance, dismissed the appeal of the plaintiffs outright, by a Judgment of 16 June 1930 in which the respective authority of the three texts of the Treaty of Saint-Germain was considered in great detail.

The first final clause of the Treaty was worded as follows: 'The present Treaty, in French, in English, and in Italian, shall be ratified. In case of divergence, the French text shall prevail, except in Parts I (Covenant of the League of Nations) and XIII (Labour), where the French and English texts shall be of equal force.' According to the Supreme Court of Poland, it followed from that stipulation that all the three texts were authentic unless there was a divergence between them and that, therefore, in order to deprive both the English and the Italian texts of their fundamental equality with the French text it was necessary to establish a divergence. The will of the contracting parties had been that, when deciding a concrete legal problem on the basis of the Treaty, all texts should be conceived as expressing their will, and that it should be investigated whether the contents of the texts were materially the same or different. Only in that last case was the French text to be authoritative. The Court added that no *argumentum a contrario* could deduce from the rule of interpretation contained in the first final

clause of the Treaty of Versailles the exclusive and unconditional binding force of the French text of Parts II to XII of the Treaty of Saint-Germain; and to arrive at that conclusion by arguing that, in case of concordance, the French text could mean nothing different from the other texts while, in case of divergence, the French text had binding force to the exclusion of other texts, would be a circumvention of the will of the contracting parties.¹ Moreover, the composition of the Peace Conference and its mode of procedure did not at all point to a predominance of the French language at the Conference and, far from proving that the English text was a translation of the French, the differences of form between the two texts seemed to evidence parallel drafting. Neither did it help the case of the plaintiffs that only the French text of Parts II to XII of the Treaty of Saint-Germain had appeared in the *Polish Official Gazette* although Parts I and XIII had appeared therein in both French and English: since the Treaty had been ratified in its entirety, the first final clause had to be applied in Poland with all the consequences that followed from its wording. The Supreme Court concluded that, by taking the English text into consideration, the Court of Appeal had acted in accordance with the first final clause of the Treaty of Saint-Germain as well as with the general rules of interpretation according to which, in order to interpret stipulations which are not clear or which permit of varying interpretations, it was necessary to consider in the first place other provisions of the same law or of the same treaty; that neither was there any logical ground for not taking the English text into account so long as it did not prove, on detailed analysis, to contain a contradiction in substance with the French text; that in no other way would it be possible to determine the divergence or agreement of the texts, as was fundamentally required by the first final clause; and that differences of form did not in themselves constitute a divergence, provided that all the texts expressed the same ideas.²

Some of the reasoning advanced by the Supreme Court of Poland calls for comment. The argument drawn from the first final clause of the Treaty of Versailles, *res inter alios acta*, was perhaps not worth refuting. On the other hand, if the texts concorded, why did the Court refer to the composition and procedure of the Peace Conference in order to weaken the authority of the French text—an authority which does not stem from the predominance of the French language during the Conference but from a provision of the Treaty—and why did it take pains to demonstrate that the English text was not a translation of the French? Unless the texts were indeed divergent, those arguments would be bereft of meaning. But if there was divergence, the French text had to prevail. Moreover, why omit all reference to the Italian text? And again, the fact that the *Polish Official Gazette* had

¹ On this point, see above, p. 126.

² *Annual Digest, 1929-1930*, case No. 235.

reproduced the French and English versions of Parts I and XIII of the Treaty of Saint-Germain but only the French text of Parts II to XII showed that the Polish Government had placed on the first final clause of the Treaty an interpretation wholly different from that of the Court and that, in the Government's view, it was proper to rely on the authentic text without further ado. Subject to these reservations, however, the doctrine underlying the Judgment of the Supreme Court of Poland is not without logical force and finds solid support in the relevant final clause. The French text was to prevail in case of divergence; consequently, if there was agreement between the texts, the French version lost its privileged status and, in the absence of any provision to the contrary, the three texts were all equally authentic. But since final clauses are nearly always drawn up somewhat automatically, so rigid an interpretation was probably open to challenge. The intention of the contracting parties seems to have been, above all, to eliminate any uncertainty that might arise from the plurality of texts and to provide the judge with a sure and rapid means of settling any dispute on the subject; to require of a judge that he constantly keep comparing the texts and only as a last resort recognize that the authentic text must prevail would seem contrary to that intention. If the doctrine of the Supreme Court of Poland is accepted, at least its limits must be determined. The related notions of divergence and agreement are relatively hazy and subjective, as has been shown on several occasions, and there is a risk that certain courts may reject the authentic text in an endeavour to reconcile the different versions at any price, even artificially. Up to what point, then, should the effort at conciliation be sustained before the authentic text is allowed to prevail? It would be somewhat arbitrary to set an exact limit,¹ but it seems reasonable to say that, in principle, there is divergence and an obligation to apply the authentic text as soon as a comparison of the texts no longer suffices to reconcile them. This is because the only type of divergence which the contracting parties would normally have in mind is a purely verbal or *prima facie* divergence, for the much more complex notion of a discrepancy which cannot be solved except by the most subtle processes of construction can only be grasped after exhaustive study of the relevant case law. In any event, when the texts can only be reconciled by reference to the preparatory work, a refusal to apply the authentic text would render the relevant final clauses wholly meaningless and constitute a flagrant disregard of the will of the contracting parties. And it would be even more inadmissible to seek to ascertain which of several allegedly consistent texts is the original version; the mere fact that a judge was driven to that extreme would show that the

¹ Hudson goes no further than to say the following: 'Where a text is in two or more languages one of which is to prevail in case of difference, the version in the other language should still be taken into account in interpretation' (*The Permanent Court of International Justice, 1920-1942*, p. 649, n. 19).

texts did not concord and that he was, consequently, bound to apply the authentic version.

The doctrine set forth and criticized above is based on a literal interpretation of the relevant final clauses. Moreover, it implies a presumption in favour of agreement between the texts; in order to bring into play the clause specifying the authentic text, it must be shown that the texts are divergent.

In other decisions, however, courts and tribunals have applied the authentic text from the very outset and disregarded the official texts without first making certain that there was some divergence. In *Aron Kahane successeur v. Francesco Parisi and the Austrian State*, for example, the agent for the Austrian Government contended that, in the Treaty of Saint-Germain, the word *ressortissant* should be understood as *national* because the latter term appeared in the English text; the Roumanian-Austrian Mixed Arbitral Tribunal held that, in deciding the case, the English text should not be taken into consideration.¹ Similarly, in the case of the *Interpretation of paragraph 4 of the Annex following Article 179 of the Treaty of Neuilly*, the Permanent Court relied exclusively on the French text of the Treaty—which, as it pointed out, was to prevail in case of divergence—and even made a point of stylistic details peculiar to that version.²

This second approach is diametrically opposed to the first. It leaves out of account the text of the final clauses, which the judge interprets without considering the condition to which the supremacy of the authentic text is subordinated. Further, it implies that the various texts are always divergent or must at least be presumed to be so. With regard to the first point, it is enough to recall that final clauses contain a number of more or less stereotyped formulas which are still accepted in diplomatic parlance but which the courts do not take into consideration because they have lost their true meaning. If this applies to the formula 'in case of divergence', and the courts may ignore it, then clauses of the second category become like those of the first and present no further difficulties of interpretation. Moreover, there are no further grounds for demurring that the method considered here implies that the different texts are always regarded as divergent; in fact, the question of divergence between the texts no longer arises. But even if the formula in question is not devoid of meaning and must be properly applied, it might be wrong to reject automatic recourse to the authentic text on the ground that it implies that the different texts are deemed divergent *a priori*. Some have argued that either the texts are divergent and the authentic text must necessarily be applied, or they are in agreement and that text may still be applied because, with regard to the point considered, it is similar to the other texts. This proposition is false, as was shown above, because the interpretation most compatible with all the texts is not

¹ T.A.M., *Recueil des décisions*, vol. 8, pp. 957–8.

² See below, pp. 148–9.

necessarily the one suggested by the authentic text viewed separately.¹ But the falsity of the reasoning is only apparent after a close examination of the relevant case law, and it is highly unlikely that the contracting parties ever worried about this. Accordingly, the objections which some courts and tribunals have voiced against an automatic recourse to the authentic text do not seem decisive. This method, which has received tacit approval from the International Court, has one practical advantage which should suffice to ensure its adoption: it is simple, rapid and sure.

After having weighed the respective merits of the two possible methods, consideration must now be given to certain decisions in which the judge invested official texts with an intermediate authority.

The first method tended, to a certain extent, to assimilate official texts to authentic texts. The second, in effect, disregarded them outright. In some decisions, the judge adopted an intermediate attitude: he relied on this or that official text, but only in a subsidiary role and in order to corroborate a conclusion at which he had already arrived. The clause relating to the authenticity of texts would not, in such cases, enter into play.

Paragraph 4 of the Annex to Section IV of Part X of the Treaty of Saint-Germain instituted a special settlement procedure for claims presented by nationals of an Allied or Associated Power in consequence of acts committed by the Austro-Hungarian Government or by the Austrian authorities after 28 July 1914 and before that Power's entry into the war; the French and English texts of the relevant passage did not agree:

English text

The amount of such claims may be assessed by an arbitrator appointed by M. Gustave Ador, if he is willing, or if no such appointment is made by him, by an arbitrator appointed by the Mixed Arbitral Tribunal provided for in Section VI.

French text

Le montant de ces sortes de réclamations pourra être fixé par un arbitre désigné par Monsieur Gustave Ador, si celui-ci y consent, ou à défaut, par le tribunal mixte prévu à la Section VI.

The French text, which was to prevail in case of divergence, was ambiguous. If Gustave Ador were not willing to appoint an arbitrator, was the Tribunal to make the appointment or was it to settle the dispute itself? Since the words *par le tribunal* could relate either to *désigné* or to *fixé*, both interpretations could be defended. The English text, on the other hand, permitted only the first interpretation. And that was the construction selected by the Italian-Austrian Mixed Arbitral Tribunal in *Clorialdo Devoto v. Austrian State*. The intention of the parties, it ruled, had clearly been to submit such disputes to the special jurisdiction of a single arbitrator and there would be no reason to renounce that jurisdiction if Mr. Ador

¹ See above, p. 126.

should refuse to appoint the arbitrator; the English version confirmed that such had been the intention of the parties.¹ The Tribunal thus sought guidance from an official text, but only to a subsidiary degree and in order to choose between two possible interpretations of the authentic version; furthermore, the English text was more than a mere translation, since the provision in question appeared also in the Treaty of Versailles where the two versions were on an equal footing.

A decision of the Italian-Bulgarian Mixed Arbitral Tribunal offers a similar example. Article 179 of the Treaty of Neuilly provided, in the French version, that certain *réclamations diplomatiques ou consulaires formulées par les représentants ou agents des Puissances alliées ou associées* could be submitted to the Mixed Arbitral Tribunals. In *De Paoli v. Bulgarian State*, the defendant contended that claims relating to occurrences before the war were not covered by that article. The Tribunal, however, held that those were precisely the claims which the authors of the Treaty had had in mind. While recalling that the French version was to prevail in case of divergence, it cited, in order to confirm its interpretation, the English text, which spoke of claims made 'before the war'.²

It should be noted that, in such cases, the official text relied upon comes into play only *ex post facto*. It is not the basis of the interpretation and, if necessary, the tribunal may reject it, as is shown by the decision of the Hungarian-Czechoslovak Mixed Arbitral Tribunal in *Hangya Produktions-Verwertungs- und Konsumgenossenschaft v. Czechoslovak State*. Article 256 of the Treaty of Trianon provided for the distribution of property belonging, in the French text, *à des collectivités ou à des personnes morales publiques exerçant leur activité sur des territoires divisés par suite du . . . Traité*. The question was whether the adjective *publiques* related only to *personnes morales* or also to *collectivités*. The Tribunal pointed out that the Italian version of the Treaty was as ambiguous as the French (. . . *appartenenti a collettività o a persone morali pubbliche*), but that the English text allowed only the first interpretation ('. . . the property of associations or public corporations . . .'). After invoking other provisions of the Treaty, however, and ruling that the term *collectivités* corresponded to no clear juridical notion, it opted for the second interpretation, recognizing nevertheless that the evidence in its favour was not decisive.³

Finally, it should be pointed out that when several treaties drawn up by the same authors in different languages contain certain identical or similar provisions, the official texts of one of those treaties may, as far as those provisions are concerned, serve as a subsidiary pointer in interpreting the other treaties. Thus the Mixed Arbitral Tribunals at times referred to the

¹ T.A.M., *Recueil des décisions*, vol. 4, p. 502.

² *Ibid.*, vol. 6, p. 456.

³ *Ibid.*, vol. 7, pp. 890-1.

Italian version of some of the provisions of the Treaties of Saint-Germain, Neuilly and Trianon in order to interpret the authentic French and English texts of the corresponding provisions of the Treaty of Versailles. Article 304 (b) of the Treaty of Versailles, for example, provided that 'the Mixed Arbitral Tribunals . . . shall decide all questions within their competence under Sections III, IV, V and VII' (*Les Tribunaux arbitraux mixtes . . . jugeront les différends qui sont de leur compétence, aux termes des Sections III, IV, V et VII*). In the case of *Leo von Tiedemann v. Polish State*, the German-Polish Mixed Arbitral Tribunal sought to show that that provision did not vest in the Mixed Arbitral Tribunals a general jurisdiction over disputes relating to matters covered by those sections, as some had contended, but one limited to the cases therein envisaged. In its decision, the Tribunal relied on the French text and the English, which it deemed *plus clair encore*; to support the two authentic texts, it also cited the Italian text of the corresponding provisions of the Treaties of Saint-Germain and Trianon (. . . *decideranno le controversie che sono di loro competenza a norma delle sezioni III, IV, V e VII*), a text which, in its view, might only have been a translation but was nevertheless official and also revealed the intention of the draughtsmen.¹ Similarly, in order to show that, under Article 297 (b) and (i) of the Treaty of Versailles, *retenir* (*rétention*) did not mean merely *frapper d'indisponibilité* but *s'attribuer* or *faire sien*, the arbitral tribunal established pursuant to the German-Roumanian Convention of 10 November 1928 invoked, in the *Schlessiger* case, the Italian text of the corresponding provisions of the Treaty of Neuilly (Article 177 (b) and (j)) and of the Treaty of Saint-Germain (Article 249 (b) and (j)), where the word was translated by *far proprio* (*appropriazione*).²

II. DIVERGENCES BETWEEN AUTHENTIC OR OFFICIAL TEXTS AND OFFICIAL TRANSLATIONS

While official texts form an integral part of the treaty and consequently possess, in the reconstitution of the intention of the parties, a certain evidential value which the preceding section endeavoured to appraise, official translations are wholly alien to the instrument. Whether prepared by the contracting parties themselves, by an international body, or by a single contracting or non-contracting State, they have in principle no value at the international level and in case of divergence between authentic or official texts and official translations the former must automatically prevail. In the case of the *Ottoman Public Debt*, for example, Arbitrator Borel

¹ T.A.M., *Recueil des décisions*, vol. 3, pp. 601-2. See also the German-Czechoslovak Mixed Arbitral Tribunal, *Paalen v. German Empire*, *ibid.*, pp. 996-7 (reference to the French and English texts only).

² United Nations, *Reports of International Arbitral Awards*, vol. 3, p. 1653.

pointed out a discrepancy between the French text and the English translation of Article 54 of the Treaty of Lausanne, but hastened to dismiss the translation as without *valeur officielle*.¹ This general rule, however, is subject to two reservations. In the first place, it may exceptionally happen that official translations are attached to a treaty and assimilated to official texts by the contracting parties. For example, Article 63 of the International Convention concerning the Traffic of Goods by Rail, signed at Berne on 23 October 1924, was entitled *Textes de la convention et leur valeur respective* and worded as follows:

‘La présente convention a été conclue et signée en langue française, selon l’usage diplomatique établi.

Au texte français sont joints un texte en langue allemande et un texte en langue italienne qui ont la valeur de traductions officielles.

En cas de divergence, le texte français fait foi.’²

The French text of the Convention was therefore authentic, and the German and Italian texts, although not signed, were in fact official texts.³ Secondly, international courts and tribunals occasionally make the mistake of relying on official translations instead of basing themselves on the original version. And obviously, the less liberal the methods of interpretation, the more dangerous reliance on translations tends to become. For example, in his arbitral award in the issue between Great Britain and the United States concerning the *Interpretation of Article 1 of the Treaty of Ghent*, the authentic text of which was in English, Emperor Alexander I of Russia, who was very enamoured of French grammar, committed—admittedly in agreement with the parties—the twin error of using the French translation of the Treaty and of adhering to the literal and grammatical sense of that translation.⁴

The situation is somewhat different at the national level, for the judge may be bound under municipal law to apply the official national translations exclusively. In *Chammas v. Ministry of the Interior*, for example, the plaintiff had invoked before the Egyptian Council of State—wrongly as it happened—the French text of one of the annexes of the Convention of Montreux of 8 May 1937 concerning the abolition of capitulations in Egypt. The Council denied him the right to rely on papers preparatory to international treaties, holding that that was a privilege of the contracting parties and that the courts should take into account only the statute ratifying the

¹ Ibid., vol. 1, p. 561.

² *League of Nations Treaty Series*, vol. 77, p. 438.

³ If these two texts can be regarded as invested with an authority equal to that of official texts, it is because, independently of the will of the contracting parties, they were drawn up before the conclusion of the Treaty. This is where they differ from the ‘authoritative’ translations which the Secretary-General of the United Nations has been requested to prepare and to add to the ‘authentic’ versions of certain instruments concluded under U.N. auspices (see, for example, *United Nations Treaty Series*, vol. 276, pp. 210, 246 and 280).

⁴ Lapradelle and Politis, *Recueil des arbitrages internationaux* (2nd ed.), vol. 1, pp. 330–7.

treaty and consider the Arab texts alone.¹ The Mixed Court of Appeal of Egypt showed greater reserve in *Ministère public v. Spender*. Reluctant to rule on a discrepancy between the authentic English text and the official French and Arabic translations of Article 4 of the Convention signed by Egypt and Great Britain on 26 August 1936 on the subject of the immunities and privileges of the British Forces in Egypt, it declined to decide upon the appeal until the Egyptian Government had been consulted.² In many decisions, on the other hand, domestic courts have firmly rejected the national translations. Thus in a Judgment of 24 June 1955 (*Koninklijke Hollandsche Lloyd v. Dampskibsselskabet Torm A.S.*), the Rotterdam District Court rejected in favour of the authentic French text the Dutch translation of the Convention of 23 September 1910 for the Unification of Certain Rules of Law with respect to Collisions between Vessels.³ And in *Dürrenberg v. Polish State Treasury*, the Supreme Court of Poland dismissed the official Polish translation of the Treaty of Versailles and adhered to the two authentic texts.⁴ Finally, it may happen that the municipal judge will adopt an intermediate attitude and use an official translation as a subsidiary means of interpretation. Thus in a Judgment of 16 May 1938 (case of *The Visurgis and The Siena*), the German Supreme Court sought the assistance of the official English translation of the International Convention of 10 April 1926 concerning the Immunity of State-owned Vessels in order to choose between two possible interpretations of the authentic French text of a provision in Article 3.⁵ In brief, the question of the authority of official translations in domestic courts is solely a matter of municipal law.⁶

¹ *Revue égyptienne de droit international*, 7 (1951), pp. 136-9. See also *International Law Reports*, 1951, case No. 132.

² *Annual Digest*, 1938-1940, case No. 191; *Bulletin de législation et de jurisprudence égyptiennes*, 50 (1937-8), pp. 334-5.

³ *International Law Reports*, 1955, p. 636.

⁴ *Annual Digest*, 1919-1922, case No. 246.

⁵ *Ibid.*, 1938-1940, case No. 94.

⁶ On the respective value in municipal law of authentic texts and official translations, see Métall, 'Fremdsprachige Staatsverträge', in *Zeitschrift für öffentliches Recht*, 9 (1930), pp. 357-89 (important). In the case of a plurilingual treaty, the influence which a domestic translation may have on the decisions of municipal courts is particularly strong when the translation was made from a single version of the treaty. For example, the German translation of the Treaty of Versailles having been prepared on the basis of the French text (Scott, *Le français langue diplomatique moderne*, p. 11), the latter had a decisive influence on the decisions of German courts. In a judgment of 29 March 1928, for instance, the German Supreme Court relied on the expression *von Rechtswegen* which had been used in Article 365 to translate the words *de plein droit* ('Les marchandises en provenance des territoires des Puissances alliées . . . et à destination de l'Allemagne . . . bénéficieront de plein droit sur les chemins de fer allemands . . . du régime le plus favorable . . .'), although the English text contained no equivalent expression, speaking only of 'shall enjoy' (*Annual Digest*, 1927-1928, Case No. 280; see the comments of Bruns in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 2, second part, p. 83).

CHAPTER III

PLURILINGUAL TREATIES IN THE PRACTICE OF
INTERNATIONAL COURTS AND TRIBUNALS:
RELATED PROBLEMS

In the practice of international courts and tribunals, plurilingual treaties may also present other problems besides those which stem from a possible divergence between the texts and which have been considered in the first two chapters. These other problems relate, first, to basic texts, in other words those which the courts use for ordinary purposes of treaty application, and, secondly, to the interpretation of texts incorporated in plurilingual treaties and of parallel passages, i.e. similar passages appearing in different instruments.

I. BASIC TEXTS

In theory and as a general rule, the existence of more than one text gives a clearer indication of the intention of the contracting parties and, even if it does not facilitate interpretation, makes the same more accurate and thorough; in the case of authentic texts, the judge is in principle bound to take them all into consideration so that they may clarify and complete each other as if they formed only one particularly explicit document. But this requires the judge to keep all the texts constantly in mind and, in practice, the circumstances surrounding judicial work and certain obstacles of a linguistic kind ordinarily prevent him from relying on all the versions of a treaty regularly and concurrently. Many courts and tribunals take as a basis the text drawn up in the language of the proceedings and only consult or at least cite the other texts in special cases, for example when a divergence has been pointed out. Thus, the Mixed Arbitral Tribunals, most of whose decisions were drawn up in French or in English, normally referred to the French or English version of the Treaty of Versailles according to whether the award was made in French or in English. Fairly frequently, however, they referred to both texts, either to stress that they agreed on an important point,¹ or to anticipate or refute an argument based on a discrepancy.² And sometimes they only cited the text drawn up in the language

¹ E.g.: '... le terme "exigible" (auquel correspond dans le texte anglais le mot "payable") vise ... , dans la langue juridique française, la faculté d'intenter présentement une action ...': German-Belgian Mixed Arbitral Tribunal (T.A.M., *Recueil des décisions*, vol. 2, p. 5). See also Franco-German Mixed Arbitral Tribunal, *ibid.*, vol. 3, p. 147 and vol. 1, p. 102.

² E.g.: '... le terme "dettes" ... embrasse l'ensemble des obligations pécuniaires ... ; ... le Tribunal n'a pas acquis la conviction que le mot "debt" employé dans le texte anglais ait une portée moins étendue qui soit de nature à justifier une interprétation restrictive du mot français correspondant ...': German-Belgian Mixed Arbitral Tribunal, *ibid.*, vol. 5, p. 107.

other than that of the decision because they considered that version clearer.¹ Consequently, in fact if not in law,² certain texts—the basic texts—exert a greater influence than others on arbitral and judicial decisions.

References to texts other than the basic text are most often made at the insistence of counsel, who naturally tend, as soon as an important point is involved, to consult all the versions in order to bring to light the one which they find most helpful; a multiplicity of texts constitutes for them a virtually inexhaustible source of arguments of varying value which the judge feels bound to refute in his judgment, with a resulting complication of the proceedings and a somewhat needless expansion of the findings. And an even more serious consequence is that the judge himself at times tends to rely, without sufficient grounds, on the text best suited to the needs of his ruling. It is surprising to note, for example, how the Mixed Arbitral Tribunals invoked sometimes the French and sometimes the English version of the second paragraph of Article 302 of the Treaty of Versailles, which was drafted as follows:

English text

If a judgment in respect of any dispute which may have arisen has been given during the war by a German Court against a national of an Allied or Associated State in a case in which he was not able to make his defence, the Allied and Associated national who has suffered prejudice thereby shall be entitled to recover compensation. . . .

French text

Si un jugement, en quelque matière qu'il soit intervenu, a été rendu, pendant la guerre, par un tribunal allemand, contre un ressortissant des Puissances alliées ou associées, dans une instance où celui-ci n'a pas pu se défendre, le ressortissant allié ou associé qui aura subi, de ce chef, un préjudice pourra obtenir . . . réparation. . . .

In *Kohn and Goldschmidt v. Joseph Schwabacher and others*, the Anglo-German Mixed Arbitral Tribunal had to rule on the question whether the above paragraph applied to a judgment given by a German court which had the effect of depriving certain creditors of a deceased debtor of the right to obtain payment from the estate (*Ausschlussurteil*); the English text seemed to call for a negative answer, since the word 'dispute' suggested ordinary proceedings. The Tribunal ruled otherwise. In its decision it relied, *inter alia*, on the words *un jugement, en quelque matière qu'il soit intervenu* and deduced therefrom that the word 'dispute' should not be interpreted to mean an ordinary action.³ By contrast, in *Ź. K. Poznański v. German State*, the German-Polish Mixed Arbitral Tribunal relied, *inter alia*, on the words 'judgment in respect of any dispute' to show that a decision given in

¹ E.g.: 'It is an essential element of a debt under Article 296 that it should become enforceable before or on the date of the coming into force of the Treaty (compare the French text of Article 296 which refers to *dettes exigibles avant la guerre* and *dettes devenues exigibles pendant la guerre*)' Anglo-German Mixed Arbitral Tribunal, *ibid.*, vol. 6, p. 684.

² Cf. above, pp. 112-13.

³ T.A.M., *Recueil des décisions*, vol. 2, pp. 209-10.

a criminal matter did not come under the paragraph cited above; the word 'dispute', it pointed out, did not have exactly the same scope as the word *matière* and generally meant an action in civil law, as indeed the word 'judgment' was not used to describe a criminal sentence or an administrative decision.¹ Thus the first Tribunal referred to the French version in order to extend the scope of the English whilst the second relied on the English version in order to restrict the scope of the French. It does not follow that the two interpretations are necessarily contradictory, for it is possible and even probable that the authors of the Treaty had in mind only civil judgments but understood 'judgment' in its widest sense, which would include the *Ausschlussurteil*; it is beyond dispute, however, that either in the first case or in the second, if indeed not in both, the Tribunal's reasoning went astray to the extent that it relied on one version only. The above would seem to show that, instead of circumscribing the intention of the authors of the treaty within narrower confines, a plurality of texts can have the opposite effect of increasing the judge's power of appreciation.

The increasingly frequent use of Russian, Spanish and Chinese as diplomatic languages since the end of the Second World War² has revealed the limits which the practice of drawing international treaties in plurilingual form could not exceed without losing its efficacy. Examples can be found in two of the basic instruments of the period: the Charter of the United Nations (of which the Statute of the International Court of Justice forms an integral part), drawn up in five authentic texts, namely Chinese, French, Russian, English and Spanish (Article 111 of the Charter); and the Treaty of Peace with Italy of 10 February 1947, the French, English and Russian versions of which were declared authentic (Article 90). An attempt will be made to show what importance the International Court of Justice and the Conciliation Commissions created pursuant to Article 83 of the Treaty of Peace with Italy, respectively, attributed to the different versions of these two instruments.

In its Advisory Opinion on the *Conditions of Admission of a State to Membership in the United Nations*, the International Court, which had been requested to determine the exhaustive or non-exhaustive character of the conditions of admission stated in Article 4 (1) of the Charter, interpreted that article solely on the basis of the English and French texts, which it held had the same meaning; and since the terms of the article seemed to the Court sufficiently clear, it considered that there was no need to refer to preparatory work.³ Judge Azevedo, in his Individual Opinion, referred only

¹ Ibid., vol. 9, pp. 354-5. In *Consorts Michaux v. German State*, the German-Belgian Mixed Arbitral Tribunal also used the argument drawn from the word 'dispute' (ibid., p. 660).

² For a survey of languages used in conventions concluded under United Nations auspices, see *Handbook of Final Clauses*, U.N. Doc. ST/LEG/6, pp. 164-8.

³ *I.C.J. Reports*, 1948, pp. 62-63.

to the French and English texts of the Charter and the Statute of the Court.¹ In their Joint Dissenting Opinion, Judges Basdevant, Winiarski, Sir Arnold (as he then was) McNair and Read interpreted the beginning of Article 4 of the Charter on the basis of the English and French texts alone, but added that, to their knowledge, the Chinese, Russian and Spanish versions did not contradict their interpretation.² Judge Zoričić, in his Dissenting Opinion, invoked only the French and English versions of Article 65 of the Statute of the Court, but wished to show that the authors of the article had corrected a divergence which had existed, in the old Statute, between the two authentic texts, namely the French and the English.³ On the other hand, Judge Krylov, in his Dissenting Opinion, stated that the five authentic texts of Article 4 of the Charter showed some differences in wording, although all expressed the same idea; he compared the English and Russian texts, on the one hand, with the French, Spanish and Chinese versions, on the other, and stated that the latter three better expressed the general principle of the constitution of the United Nations; in another place, he noted that in Article 4 the word *pacifiques* had a somewhat passive meaning, while the corresponding words in the English, Russian, Spanish and Chinese texts possessed a more active sense.⁴

Similarly, in the case concerning the *Aerial Incident of 27 July 1955* (*Israel v. Bulgaria, Preliminary Objections*), Judge Badawi in his Separate Opinion relied solely on the English and French texts of paragraph 5 of Article 36 of the Court's Statute.⁵ *Ad hoc* Judge Goitein, in his Dissenting Opinion, also took little notice of the three other authentic texts of the Statute, on which the Bulgarian Government's counsel, by contrast, seems to have largely relied.⁶ Judges Sir Hersch Lauterpacht, Wellington Koo and Sir Percy Spender, for their part, held in their Joint Dissenting Opinion that the Chinese, Russian and Spanish texts of the Statute were mere translations of the English; they accordingly relied solely on the two versions drawn up in the 'official working languages'⁷ adopted at the San

¹ *I.C.J. Reports*, 1948, pp. 73 and 79.

² *Ibid.*, p. 86. Also, interpreting a passage from the report of Committee I/2 of the San Francisco Conference, these judges rejected a possible meaning of the English version as purely conjectural and inconsistent with the French (*ibid.*, p. 88).

³ *Ibid.*, pp. 94-95. The United Nations Committee of Jurists appointed to draw up the Statute of the International Court of Justice took as a basis for its work the two authentic texts—English and French—of the Statute of the Permanent Court of International Justice, but the draft statute and the Committee's report to the San Francisco Conference were drawn up in English, French, Chinese, Spanish and Russian (*U.N.C.I.O.*, vol. 14, pp. 242-6).

⁴ *I.C.J. Reports*, 1948, pp. 110 and 112.

⁵ *Ibid.*, 1959, pp. 149-50. See also the Separate Opinion of Judge Armand-Ugon, *ibid.*, p. 154.

⁶ *Ibid.*, p. 197.

⁷ This expression is somewhat confusing. At the San Francisco Conference, there were two working languages (English and French) and five official languages (English, French, Spanish, Chinese and Russian) (*U.N.C.I.O.*, vol. 1, pp. 165-6 and vol. 5, pp. 138-9 and 198-200). The provisional Secretariat had suggested the adoption of a single working language, namely English

San Francisco Conference; as between those two texts, which they considered equivalent in meaning (even if the French version seemed to them clearer), they established no priority, although they stated that, in its final version, the disputed passage had originally been drawn up in French.¹ Finally, in his Dissenting Opinion attached to the Advisory Opinion on the *International Status of South-West Africa*, Judge De Visscher relied on only the French and English texts of Articles 75 and 77 of the Charter,² while Judge Armand-Ugon based himself solely on the French text of Article 48 of the Court's Statute in his Dissenting Opinion attached to the Judgment in the case concerning the *Right of Passage over Indian Territory (Merits)*.³

This survey shows that, despite the provisions of the Charter regarding the authenticity of texts, the International Court and its individual members tend to rely solely on the French and English versions of that instrument and to consider the Chinese, Spanish and Russian versions as mere translations.⁴ The care with which Judge Krylov, in his Dissenting Opinion attached to the Advisory Opinion on the *Conditions of Admission of a State to Membership in the United Nations*, examined the latter three texts seems to be an exception, in the same way as the brief reference to those texts in the Joint Dissenting Opinion, attached to the same Advisory Opinion, of Judges Basdevant, Winiarski, Sir Arnold (as he then was) McNair and Read. This reserve shown by the Court and its members towards the Chinese, Spanish and Russian texts of the Charter can be partly explained by practical considerations—decisive, at all events, in the case of the Chinese—and even more, by the fact that English and French were the working languages of the San Francisco Conference.⁵ There is reason to believe, however, that the Court would in any event not demand consistency between *all* the authentic texts of a treaty drawn up in four or five languages. In the *Colombian-Peruvian Asylum* case, Colombia contended that the Convention on Political Asylum signed at Montevideo on 26 December 1933 merely interpreted the Havana Convention on Asylum of 20 February 1928. The Court dismissed that argument by invoking the Spanish, French and Portuguese texts of the preamble of the Montevideo Convention, where that instrument was said to modify the Havana Convention.⁶ Yet the English text, of which no mention was made, was also authentic and certainly did not speak of any 'modification',

(*ibid.*, vol. 5, p. 18); but M. Bidault insisted, at the first meeting of the chiefs of delegations, that French should be placed on a footing of complete equality with English (*ibid.*, pp. 50–52).

¹ *I.C.J. Reports*, 1959, pp. 161–3.

² *Ibid.*, 1950, p. 186.

³ *Ibid.*, 1960, p. 76.

⁴ On the drafting of the Russian text of the Charter, which may play a more important role in the future, see Krylov, *Materialy k istorii Organizatsii Ob'edinennykh Natsii* (Publications of the Institute of Law of the Academy of Sciences of the U.S.S.R., Moscow–Leningrad, 1949), vol. 1, pp. 236–7.

⁵ See above, p. 142, n. 7.

⁶ *I.C.J. Reports*, 1950, p. 276.

the relevant passage being worded as follows: 'Wishing to conclude a Convention on Political Asylum, to define the terms of the one signed at Habana. . . .'

Similar, though less apparent tendencies, can be found in the decisions of the Conciliation Commissions created pursuant to Article 83 of the Treaty of Peace with Italy of 10 February 1947. The Italian-United States Conciliation Commission often had to interpret certain provisions of that Treaty, of which—it should be recalled—the French, English and Russian texts were authentic (Article 90); it rarely referred, however, to the Russian version. In the *Carnelli* case, for example, it stressed the concordance of the English and French texts on a specific point, as also of the official Italian version which, it noted, was not authentic; but it made no mention whatever of the Russian version.¹ Similarly, in the *Bacharach* case, it relied exclusively—as had also done, apparently, the agents for the two parties—on the English and French texts of the Treaty in interpreting the second sub-paragraph of Article 78, 9 (a). In the *Flegenheimer* case, on the other hand, after the United States agent had expressly invoked the Russian text of that sub-paragraph, the Commission admitted that the three texts were equally authentic and that it had to attempt to reconcile them.² But the Italian-United Kingdom Conciliation Commission, in its decision of 8 May 1954 concerning its competence, noted a difference in wording between the French and English versions of Article 83 of the Treaty of Peace with Italy, without mentioning the Russian version,³ and in *Società Mineraria e Metallurgica di Pertusola*, the Franco-Italian Conciliation Commission based itself solely on the French and English texts of the Treaty, pointing out that none of the parties had relied on the Russian version.⁴ Judging from the readily available decisions, therefore, the findings of the Conciliation Commissions created under Article 83 of the Treaty of Peace with Italy seem to show that, in general, those Commissions relied exclusively on the English and French texts of the Treaty, referring to the Russian only when one of the parties to the dispute had invoked it. Quite possibly, however, this version deserves more consideration than the Chinese, Spanish and Russian texts of the Charter: Russian was the language of one of the members of the Council of Foreign Ministers,⁵ and at the Paris Conference of

¹ *Collection of Decisions of the Italian-United States Conciliation Commission*, vol. 1, case No. 1, decision No. 5, p. 6.

² On the *Bacharach* and *Flegenheimer* cases, see above, p. 80, n. 1.

³ *International Law Reports*, 1955, p. 872.

⁴ *Recueil des décisions de la Commission de conciliation franco-italienne*, vol. 3, pp. 75-76.

⁵ Paragraph 9 of Article 78 of the Treaty of Peace with Italy, which was at issue in the *Bacharach* and *Flegenheimer* cases, is the exclusive work of the Council of Foreign Ministers, since the Paris Conference adopted the text submitted to it by the Council without change (Draft Treaty of Peace with Italy, Article 68, paragraph 8; see *Collection of Documents of the Paris Conference*, vol. 4, pp. 412 and 321).

1946 it was both an official and a working language, alongside French and English.¹

It would thus seem that often, when a treaty is drawn up in more than two languages, as is the case with most instruments concluded under the auspices of the United Nations and the specialized agencies, the provisions relating to the equality of texts are only effectively applied, even in the practice of the highest international judicial body, with respect to the texts drawn up in the most current diplomatic languages. By multiplying authentic texts, therefore, authors of treaties open the door to judicial legislation, for they compel the court or tribunal to make its own choice. This point could well be borne in mind during the negotiations.

Finally, it may happen that the plurality of texts confuses the judge instead of facilitating his task. In *Binon v. German State and S.A. des Glaces de Reisholz et Schlesische Feuerversicherungs Ges.*, the Belgian-German Mixed Arbitral Tribunal was called upon to interpret the final phrase of Article 296 (2) of the Treaty of Versailles, a phrase which spoke of debts resulting from contracts 'of which the total or partial execution was suspended on account of the declaration of war' (*[dettes résultant de contrats] dont l'exécution totale ou partielle a été suspendue du fait de la déclaration de guerre*). The Tribunal found this provision obscure: if it referred to a suspension *de jure*, it could not apply to the continental countries, for on the Continent the declaration of war had not entailed, as in Great Britain, any such suspension of the execution of contracts; as to a *de facto* suspension, the provision could not cover it, because such suspension had resulted not from the declaration of war but from the circumstances of war. The Tribunal concluded therefore that the only plausible explanation of Article 296 (2) was that it had been drawn up by Englishmen and translated into French without the translator considering the difficulties which its application to the continental nations would involve. In order to be able to apply that paragraph to relations between nationals of those nations, the Tribunal introduced into it the continental doctrine corresponding to the Anglo-Saxon doctrine which it attributed to the authors of the text; since, in the matter of contracts, the prohibition against trading with the enemy had had, as between the Frenchmen and Belgians, on the one hand, and the Germans, on the other, effects similar to those flowing from the declaration of war in relations between Englishmen and Germans, the text had to be construed, in the Tribunal's view, as follows: [*Les dettes résultant de contrats*] *dont l'exécution totale ou partielle a été suspendue du fait de la déclaration de guerre ou, postérieurement, par l'interdiction du commerce avec l'ennemi*.² It goes without saying that this interpretation was purely an interpolation. Believing

¹ Rules of Procedure, Article IV (*Collection of Documents of the Paris Conference*, vol. 1, p. 151).

² T.A.M., *Recueil des décisions*, vol. 2, pp. 217 and 219-20.

it necessary to attribute to the parties an Anglo-Saxon doctrine which was inapplicable to the case under consideration, the Tribunal made good the lacuna in the text by analogy and then incorporated into the text the result of its reasoning. The frailty of this construction is apparent from its purely conjectural nature: to say that the paragraph in question was drawn up by Englishmen and then translated into French was a gratuitous assertion, without any analysis of the context or reference to the preparatory work to support it.¹ It is understandable, therefore, why the Tribunal later disclaimed its own ruling. In the *Office de vérification et de compensation belge v. Reichsausgleichsamt, In re Devillé v. Germania*, it held that the words *du fait de la déclaration de guerre* did not mean *par la déclaration de guerre* but *en raison de la déclaration de guerre*, as was clearly shown by the English expression 'on account of the declaration of war . . .', and it recognized that the article referred to *de facto* suspension as well as to *de jure* suspension.² This interpretation was perfectly consistent with both texts, which were indeed exactly parallel. The inevitable conclusion with regard to the first decision is that the Tribunal was drawn into error by the duality of texts. In its 'plausible explanation' of the disputed paragraph, it is easy to perceive an implicit relationship between the English text and the Anglo-Saxon doctrine and between the French text and the continental doctrine. Hence the somewhat unusual nature of this explanation. For while the fact that the text had been drawn up by Englishmen could give rise to a presumption in favour of the Anglo-Saxon doctrine, it was certainly no business of the translator of the article to worry about the difficulties to which its application to continental nations might give rise.

II. INCORPORATED TEXTS AND PARALLEL PASSAGES

A. *Incorporated texts*

When a treaty borrows some of its provisions from another treaty, the question arises whether the judge called upon to interpret those provisions should, where necessary, assess the respective value of the different texts on the basis of the first treaty or of the second.

If it is a matter of incorporation by reference, then clearly the final clauses of the second instrument are the ones to be consulted: in principle, they govern the entire instrument and any reference to the same necessarily bears their imprint. For example, the Treaty of Berlin of 25 August 1921, concluded between the United States and Germany with a view to restoring between the two countries the friendly relations interrupted by the war,

¹ In the cases of the *Trustees of I. Morris v. W. Michaelis and J. Stamm and Company v. Baucredit Bank*, the Anglo-German Mixed Arbitral Tribunal attached to the French version of this paragraph at least as much weight as to the English. T.A.M., *Recueil des décisions*, vol. 5, p. 321 and vol. 1, p. 868.

² *Ibid.*, vol. 4, pp. 700-2.

provided in its Article II that the United States would enjoy in its relations with Germany the rights and advantages stipulated in Section I of Part IV and in Parts V, VI, VIII, IX, X, XI, XII, XIV and XV of the Treaty of Versailles. The United States-German Mixed Claims Commission called upon to apply the Treaty of Berlin was therefore obliged to interpret some provisions of the Treaty of Versailles, and it did not hesitate, where necessary, to base itself both on the French and English versions of that Treaty. That was done by Umpire Parker in *United States, Garland Steamship Corporation and others (United States) v. Germany*, in interpreting the expression 'naval and military works or materials' (*ouvrages et matériel militaires ou navals*) (Part VIII, Section I, Annex I, paragraph 9).¹

By contrast, difficulties may arise when the first treaty actually reproduces the provisions which it borrows. If it is not drafted in the same languages as the instrument from which those provisions originate, what will be, with regard to those provisions, the status of the different texts? If, for example, treaty A, of which the French and German texts are authentic, repeats with reference to the original a given article of treaty B, which is drawn up, in turn, in French and English, should the German version of that article in treaty A be regarded as an authentic text or as a mere translation? Both these solutions have been proposed in judicial proceedings. The Treaty of Berlin, besides containing the reference to certain provisions of the Treaty of Versailles, reproduced in its preamble long extracts from the Resolution of 2 July 1921 (the Knox-Porter Resolution), in which the United States Congress had declared the termination of the state of war with Germany, and provided in Article I that Germany would grant to the United States all the rights and privileges specified in that Resolution. The Treaty had been concluded in English and German; in the absence of any provision to the contrary, it had to be presumed that the two texts were equally authoritative. In *Provident Mutual Life Insurance Company and others (United States) v. Germany*, brought before the aforesaid Mixed Commission, the German Commissioner referred, in order to confirm one of his interpretations, to the German text of an extract from the Knox-Porter Resolution reproduced in the Treaty of Berlin. He pointed out that the representatives of the United States had accepted and signed the German text of the Treaty, that the German had the same controlling effect as the English, and that since the instrument was a contract concluded between two States it would be wrong to seek the intention of only one of them and

¹ United Nations, *Reports of International Arbitral Awards*, vol. 7, p. 77. See also *ibid.*, p. 87, as well as the opinions of the United States and German Commissioners in *Christian Damson (United States) v. Germany* (*ibid.*, pp. 190 and 192 respectively) and the opinion of the German Commissioner attached to Administrative Decision No. VII (*ibid.*, pp. 215-16).

to interpret the instrument solely on the basis of the English version.¹ The United States Commissioner, in his Opinion attached to the Mixed Commission's Administrative Decision No. VII, defended the opposite viewpoint. According to his contention, the principle of the equality of texts, acceptable as it was elsewhere, could not apply to the Resolution, which had to be regarded as incorporated into the Treaty exactly as passed by Congress, i.e. in the English version.² The Umpire did not rule on the question, but a diplomatic development during the preparation of the Treaty of Peace with Italy of 10 February 1947 seems to support the United States Commissioner's thesis. In Article 10 of that Treaty, it is stated that the Allied and Associated Powers have taken note of the provisions of the Austro-Italian agreement of 5 September 1946, the text of which appears in Annex IV to the Treaty; that agreement had been concluded solely in English; a few days before the signature of the Treaty, the Italian Foreign Minister, Count Sforza, informed the Council of Foreign Ministers that the French translation of the agreement appearing in the authentic French text of the Treaty contained serious errors and that only the English version of the agreement was authentic.³ The authors of the Treaty seem to have recognized the soundness of that argument, for in the English text of Annex IV they recall, in a note, that it is the original English text of the agreement, as signed by the two parties and communicated to the Paris Conference. And since, under Article 85, the annexes are regarded as an integral part of the Treaty, with the same force and effect, the only conclusion is that Annex IV constitutes an exception to the clause in Article 90 relating to the authenticity of texts.

B. *Parallel passages*

The somewhat arbitrary character of final clauses relating to the authenticity of texts may have paradoxical consequences when the same provision, drawn up by the same authors, appears in separate treaties whose authentic texts are not in the same languages. It may then happen that, independently of any difference between the contexts, that provision must or may be differently interpreted depending on the treaty in which it appears. Paragraph 4 of the Annex to Section IV of Part IX of the Treaty of Neuilly, for example, reproduced, *mutatis mutandis*, paragraph 4 of the Annex to Section IV of Part X of the Treaty of Versailles. In its Judgment relating to the *Interpretation of paragraph 4 of the Annex following Article 179 of the Treaty of Neuilly*, the Permanent Court relied entirely on the French text of the Treaty, pointing out that it was to prevail in case of divergence, and based

¹ *Reports of International Arbitral Awards*, vol. 7, pp. 98 and 101-2. See also the opinion of the German Commissioner attached to Administrative Decision No. VII (*ibid.*, p. 216).

² *Ibid.*, pp. 207-8.

³ Vedovato, *Il trattato di pace con l'Italia*, pp. 557-8.

its decision, *inter alia*, on certain stylistic details peculiar to that text.¹ But this leaves unanswered the question of the scope of an argument which the Court could not have advanced if it had had to interpret the corresponding paragraph of the Treaty of Versailles, in which the French and English texts had equal force.

Furthermore, when a given text of the provision under consideration is authentic in one treaty but only official in the other, the scant importance which the judicial body called upon to apply the second treaty might attach to that text is liable to detract from the authority which the same text has in the first treaty. Thus, in the *National Bank of Egypt v. Austro-Hungarian Bank*, the Anglo-Austrian Mixed Arbitral Tribunal was called upon to decide whether nationals of Egypt, then a British Protectorate, could rely on Sections III and IV of Part X of the Treaty of Saint-Germain, which authorized the 'nationals' (*ressortissants*) of Allied or Associated Powers to sue before the Mixed Arbitral Tribunals. The Tribunal ruled in the affirmative, on the basis of paragraphs (d) and (e) of Article 248, under which the Protectorates of Allied Powers were assimilated to those Powers themselves; in order to corroborate its conclusion, it invoked of its own motion a decision of the Franco-German Mixed Arbitral Tribunal, in which it was said that the word *ressortissant* was of larger scope than the English word 'national', and cited a passage from Sir Ernest Satow stating that the word *ressortissant* comprised both citizens of the French Republic and persons under its protection.² The argument drawn from the French text was permissible, because that text was to prevail in case of divergence, but it was not indispensable—since the Tribunal could have given its decision without dwelling on the words 'national' and *ressortissant*—and involved a certain amount of risk, for the discredit cast thereby on the English text of the Treaty of Saint-Germain also tended to detract from the corresponding provision of the Treaty of Versailles, even though in the latter the English version was as authoritative as the French. The imminence of that risk was confirmed shortly thereafter. In a similar case before the Anglo-German Mixed Arbitral Tribunal, the same plaintiff relied on the above argument with regard to Article 297 (e) of the Treaty of Versailles. The Tribunal was thus obliged either to reject one of the authentic texts of the Treaty or to disclaim the interpretation placed by the Anglo-Austrian Tribunal on the word *ressortissant*. It chose the second solution, stressing, in a decision otherwise similar to that of the Anglo-Austrian Tribunal, that the distinction

¹ P.C.I.J., Series A, No. 3, pp. 5-7. See the observations of Arbitrator R. Fazy on this subject in the *Goldenberg* case (United Nations, *Reports of International Arbitral Awards*, vol. 2, p. 906, n. 5).

² T.A.M., *Recueil des décisions*, vol. 3, pp. 238-40. In *Aron Kahane successeur v. Francesco Parisi and the Austrian State*, the Roumanian-Austrian Mixed Arbitral Tribunal recalled this decision, but without stating a clear opinion on the respective meaning of the two texts (*ibid.*, vol. 8, pp. 957-8).

between the words *ressortissants* and *nationaux* was not confirmed by practice and that the Treaty itself tended to use both words in the same sense.¹ The Tribunal thus preserved the concordance between the two texts, but only by departing from established precedent.

CONCLUSIONS

Divergences between authentic texts

In resolving conflicts between authentic texts, international courts and tribunals have resorted to a wide range of expedients.

I. When confronted with divergent texts invested with an equal authority which the express or implied will of the parties requires him to respect, the judge endeavours in the first place to reconcile them. Several courses are open to him.

A. Often a mere comparison of the texts is enough to bring to light one or more possible meanings, in which case one of two hypotheses may be envisaged, depending on whether the divergence is due to the fact that at least one of the versions lends itself to several logically defensible constructions or to the fact that one of them is obscure or vague.

(1) In the first hypothesis, if each of the texts can be interpreted in several ways, the judge must carry all the texts into effect by adopting a construction common to all; but if one of the texts lends itself to several interpretations whereas the other permits only one of these, the latter will prevail. In either case, the plurality of versions facilitates interpretation by limiting the number of possible solutions; and in the second case, the judge is actually bound to follow the text which allows only one interpretation, subject to the possibility for the party wishing to see that text rejected to weaken its authority by showing—with appropriate evidence, for a derogation from the principle of the equality of texts cannot be presumed—that it is in fact a mere translation prepared outside the control of the treaty's authors.

(2) In the second hypothesis, the judge must in principle give preference to the clearer and more precise text, since the obscure or vague version normally fails to express or expresses badly the intention of the parties. In so doing, he is giving effect exclusively to the clearer and more precise version. Since the texts have been invested with equal authority, the rule that the clearer text prevails presupposes that the principle of equality of texts is not applicable to the clause under consideration and that the clear text necessarily reflects the true intention of the parties; this is a legitimate

¹ *National Bank of Egypt v. German Government and Bank für Handel und Industrie*, T.A.M., *Recueil des décisions*, vol. 4, pp. 236–7.

presumption, but it can be rebutted by evidence that a deliberately vague expression has been distorted in one of the authoritative texts by a more precise term. The rule must accordingly be used only with prudence and discretion. Nevertheless, when the less clear text would itself suffice for purposes of interpretation, the judge is in reality giving effect to both texts and invokes the clearer one only in order to increase the persuasive authority of the judgment. Lastly, just as a clear term prevails over a vague one, so does a technical and more particularly a legal expression prevail over a general one but, here again, there is only a presumption; moreover, diplomatic instruments must be construed more liberally than the provisions of municipal legislation.

B. If a mere comparison of different versions does not enable him to reconcile them, the judge may refer to the context in order to show that, in one of the texts, a given expression has not been used in its ordinary sense. This method is particularly appropriate when, according to its ordinary sense, a term has a more restricted range in one version than in the other. The judge may then adjust the range of application of the term as the context requires, either by expanding it in one version or by limiting it in the other.

C. If the judge is unable to reconcile the different versions by means of comparison even with the assistance of the context, he may still leave the texts aside for the moment, consider the instrument from a higher angle, analyse all the extrinsic elements liable to shed light thereon—*ratio legis*, the economy of the treaty, the logical or illogical consequences of all the possible interpretations, &c.—and return to the texts only after forming an opinion; it may then happen that, in the light of the construction so obtained, the divergences between the versions prove insignificant. If the judge can also show that the authenticity of the text which does not seem to fit his interpretation is suspect, his reasoning is thereby reinforced.

D. In the exceptional cases where a study of the successive stages through which the various versions passed enables the judge to trace the difference to a documented source, the problem of interpretation disappears.

II. The principle of the equality of texts is not sacrosanct and the judge can give preference to the original version. Sometimes this method supersedes that of conciliating the texts—either because they prove incompatible or because the judge gives up the attempt at conciliation at the very outset—and sometimes it is superposed thereon. Outside the exceptional case where the instrument itself contains an *ad hoc* clause, the original text is determined by linguistic factors or by a study of the preparatory work; while the former justify only presumptions, the latter generally enables the judge to determine the original text of the whole or any part of the instrument with certainty, but it is not sufficient to invoke such work or to

refer thereto in a vague manner and the whole genesis of the provision under consideration must be effectively brought to light. As a choice has to be made between incompatible texts, it is only normal for the judge to lean in favour of the original because that is the basis on which the negotiators in fact first reached agreement, the authority of the other texts being subject to their conforming with the original; but the strength of this presumption depends on the circumstances in which the other texts were drawn up, so that the evidential value of the original necessarily varies from case to case.

III. When the discrepancy between the texts is manifestly due to negligent drafting and the sense of the provision in question is not in doubt, international courts and tribunals must not hesitate to make their own corrections to the defective text (*falsa demonstratio non nocet*).

IV. When the different texts are clear, the judge may sometimes, even if they do not agree, start from the assumption that they are all correct, apply each of them separately and successively and thus give his judgment without ruling on the intention of the parties; this, however, is an expedient pertaining to judicial logic and not to the interpretation of treaties, for it fails to indicate what meaning is to be given to the provision at issue.

V. Instead of himself solving the problem to which a discrepancy between the texts of a treaty gives rise, the judge may request the parties to interpret the disputed provision themselves; an authoritative interpretation, which is essentially a legislative measure, may assume any form, provided that the agreement of the parties is plain.

VI. (1) The text drawn up in the language used in the proceedings before the court or tribunal enjoys no special status; at the most it can be said that, very often, it in fact predominates as long as the judge's attention has not been drawn to any discrepancy.

(2) The rule of the primacy of the text favouring the obligor only comes into play as a last resort, when the intention of the contracting parties remains doubtful despite all the efforts at construction; it is a rule of equity and not of the interpretation of treaties, for it does not seek to carry into effect the intention of the contracting parties; its importance is theoretical rather than practical, and tribunals tend to resist vigorously the efforts frequently made by the obligor to bring the texts into conflict in order to be able to claim the application of the version more favourable to his cause.

(3) The case law of international courts and tribunals does not decisively confirm the rule of the primacy of the text drawn up in the language of the State to which the disputed provision refers.

(4) There is no substance to the contention that each party is only bound by the text drawn up in its own language; and there is equally little merit in the argument that each party is only bound by the text which it has ratified.

(5) National courts called upon to apply international treaties sometimes rely, in resolving conflicts between different versions, on rules of interpretation which govern municipal statutes.

VII. From the standpoint of interpretation, the evidential value of punctuation is considerably inferior to that of the substantial elements of the text.

Divergences between authentic texts and official texts

In order to solve conflicts between authentic texts and official texts, it is theoretically sufficient to consult and interpret the relevant final clauses, i.e. to ascertain, in each set of circumstances, what was the intention of the parties on that point. In practice, difficulties arise from the fact that those final clauses must generally, by reason of their more or less stereotyped character, be interpreted less on the basis of the text than in the light of diplomatic usage. It is therefore necessary to know how courts and tribunals have interpreted and applied those clauses in actual fact. Clauses relating to the authenticity of texts are divided into two principal categories.

I. Clauses of the first category simply state that a given text is authentic, whence it follows, *a contrario*, that official texts must not be taken into account for purposes of interpretation; such clauses are interpreted without difficulty on the basis of the text alone.

II. In clauses of the second category, which are the more frequent, the primacy of the authoritative text is subject to certain conditions. Most often, it is specified that a given text shall prevail *in case of divergence*. The true scope of these clauses can only be measured in the light of case law, which reveals two distinct approaches. According to some decisions handed down by national courts, these clauses mean that all the texts are authentic unless there is discrepancy between them, so that the authoritative text cannot be invoked unless it is shown that some discrepancy exists; this doctrine, which is based on a literal interpretation of the relevant clauses and implies a presumption in favour of concordance between the texts, seems to have obtained no endorsement from international courts and tribunals and is open to challenge; if it is accepted, then at least its limits ought to be indicated—for there is the risk of certain judicial bodies rejecting the authoritative text in an endeavour to reconcile the different versions, even artificially—and it seems reasonable to affirm, as a principle, that there is divergence and a resulting duty to apply the authoritative text as soon as a comparison between the different versions does not suffice to reconcile them. In other decisions, the judge applies the authoritative text from the outset and disregards the official texts without even inquiring whether there is disagreement; while departing from the stipulations contained in the relevant final clauses and implying that the texts under consideration

are always divergent, this method has been implicitly endorsed by the International Court and has certain practical qualities which should suffice to guarantee its adoption: it is simple, speedy and sure. Finally, the judge may at times invest the official texts with an intermediate status and refer to one or other of them purely as a subsidiary factor, in support of a conclusion he has already reached.

Divergences between authentic or official texts and official translations

While official texts are an integral part of the treaty and therefore carry some weight as evidence in the reconstitution of the intention of the parties, official translations stand entirely apart from the instrument; they are in principle valueless at the international level and divergences between authentic or official versions and official translations are automatically resolved in favour of the former. In the domestic context, however, this is not necessarily the case, for the judge may be bound by his municipal law to apply solely the official domestic translation.

Related problems inherent in the interpretation of plurilingual treaties by international courts and tribunals

I. (1) In theory, a plurality of texts facilitates the understanding of the intention of the contracting parties; but in practice, the conditions in which judicial work is done and various linguistic difficulties normally prevent tribunals from relying on each and every version of the treaty regularly and concurrently. Many courts and tribunals base their decisions on the text in the language in which the proceedings are being conducted, and only consult the other versions in special circumstances, such as when a divergence has been brought to their attention. Therefore, in fact if not in law, some texts carry more weight than others in arbitral or judicial decisions.

(2) Reference to texts other than the basic ones is due most often to the initiative of the pleader, for whom the existence of several texts represents a mine of arguments of varying value which the judge feels bound to refute in his decision; the plurality of texts therefore complicates the proceedings and encumbers the judgment to no great advantage. Moreover, the judge himself at times tends to rely without adequate reason on the text best suited to the needs of his award; instead of circumscribing the thoughts of the treaty's authors within a more precise framework, the multiplicity of texts may thus have the effect of unduly increasing the judge's powers of appreciation.

(3) The increasing adoption of Russian, Spanish and Chinese as diplomatic languages since the end of the Second World War has revealed the limits which must be observed in drafting plurilingual international treaties

if full efficiency is to be maintained; often, when a treaty is drafted in more than two languages, as most instruments of general application now are, the force of the provisions relating to the equality of the texts is limited, even in the practice of the International Court, to the texts drawn up in the languages enjoying greatest currency in diplomatic usage; this is a fact which should be borne in mind during the negotiations.

II. When a treaty borrows some of its provisions from another treaty, the judge must, in interpreting those provisions, appreciate the respective value of the different texts in conformity with the second treaty; this rule is absolute in cases of incorporation by reference and would also seem to apply, although the precedents on this point are not fully conclusive, when the first treaty reproduces the borrowed provisions.

III. When the same provision, drawn up by the same authors, appears in separate treaties the authoritative versions of which are not in the same languages, it may happen that this provision has to be differently interpreted depending on the treaty under consideration; this paradoxical result clearly demonstrates that final clauses concerning the authenticity of texts are apt to be somewhat arbitrary. Moreover, when a version of the provision at issue is authoritative in one treaty but not in the other, there is a risk that the judge called upon to apply the second treaty may attach to that text such scant importance as to weaken the authority which the same text possesses in the first treaty.

STATE CONTRACTS IN INTERNATIONAL LAW*

By PROFESSOR R. Y. JENNINGS

How far does a sovereign State which enters into a contract with an alien become subject thereby to obligations of public international law? This is a question of some difficulty. The whole topic of State responsibility, though central to the structure of the law of peace, is the focus of a difference of opinion about basic principles which has hitherto rendered abortive the most strenuous efforts to systematize this part of the law. The particular topic of State contracts impinges upon some of the hardest questions of international law. For it cannot be considered apart from the relationship of international law and municipal law; the relationship of public international law and private international law; the question of the subjects of international law; and the limits of domestic jurisdiction and the reserved domain. Moreover, the opinions of writers on the legal position of State contracts range from the view that the State contract is directly subject to the international law rule of *pacta sunt servanda* to the view that 'contracts cannot be the subject of international disputes since international law contains no rules respecting their form and effect'.¹

It may be as well to say at once that this article is not intended as a manifesto on one side or the other of this dispute. The aim is a more modest one: to attempt a reconsideration of some of the basic questions of principle involved, with the aim of discovering if possible a viable framework within which this part of the law can usefully be developed and within which a more ambitious investigation might perhaps usefully proceed.²

The first thing to do is to state the problem. The proper law of a State contract is normally the municipal law of the contracting State. In such a case the contracting State may disappoint the expectations of an alien contractor in a number of ways. It may refuse to honour obligations owed even according to the local law. But the difficult case arises where the State has itself *changed* the local law; for since the contract is created in the local municipal law and subsists in that law it follows that it may be terminated within that law. Suppose now that the State by the exercise of its sovereignty so alters the local law as to end its obligations under the contract before

* © Professor R. Y. Jennings, 1962.

¹ Friedman, *Expropriation in International Law* (1953), p. 156.

² The writer must at once acknowledge his indebtedness to Dr. Mann's article in *American Journal of International Law*, 54 (1960), pp. 572 et seq., which, though presenting a point of view somewhat different from that of the present article, contains a very clear analysis of the elements of the problem.

the period has run or in some other way contrary to the intentions originally embodied in the contract. In this case, though common sense might suggest that there has been a breach of contract, there is yet no breach according to the proper law. Is this the end of the matter? Or is there a remedy in international law, and, if so, what is the extent of it and under what conditions does it arise? In so far as an international law remedy may be found to exist, is it in any sense a contractual remedy; or is it only, as some would hold, for some supervening delict independent of and distinct from the contract? These are the questions we must attempt to answer.

Now it is, of course, true that some system of law other than the local municipal law may be the proper law of such a contract; whether the general principles of law,¹ or even public international law. In such cases the solution of the problem may be changed.² But for the moment it will be best to concentrate on the State contract which has the local municipal law as its proper law, because it is this situation that raises the difficulties of principle most clearly. It is this kind of contract, therefore, that the following pages are mainly about.

First there is a short introductory section intended to do little more than to recall something of the historical context of the problem. Next, bearing in mind that the question is not only whether there is any international contract law but whether this is even possible in principle, the latter question will be tackled at the outset. Turning then to the substantive law, some primarily delictual or tortious remedies will be examined and then their relationship to denial of justice and to the rule requiring the exhaustion of local remedies; there follows a brief inquiry into reparation and compensation; then the doctrine of acquired rights; and the principle of *pacta sunt servanda*. Finally, an attempt is made to draw together the results of the investigation.

I

Introduction

It may be as well to begin with a brief excursion into the comparatively recent history of the matter. For whilst it is true that the law has changed considerably in the last fifty years, and that the early precedents are not always acceptable today, it is also true that the classical controversies illustrate some abiding problems of this part of the law.

One factor that should constantly be borne in mind in consulting some of the earlier precedents and authorities on State responsibility is that in the nineteenth century and the early twentieth century, these questions

¹ See McNair in this *Year Book*, 33 (1957), pp. 1 et seq.

² See below, p. 177.

were very much bound up with forcible intervention and self-help. The first move might be on the level of diplomatic representation; but the next move might not infrequently be intervention, which moved easily across the vague and shadowy legal boundary that divided it from the condition of technical war; and it is easy to forget that it is only comparatively recently that the law ceased to allow that war was no illegality whatever its motive or purpose. Pacific intervention, it is true, was unlawful unless for a purpose which the law allowed, but what those purposes were was far from clear: and it needed only the presence of an *animus belligerendi* on the part of one of the parties to render those legal limitations, such as they were, otiose at any moment.

In this situation therefore, which prevailed until the early years of the twentieth century, the question whether or not a government should intervene in a dispute between one of its nationals and another government was frequently one in which policy was more important than law,¹ and it was to be expected that Governments would often be unwilling to intervene in cases of a breach of contract and this for reasons which are by no means confined to international law. 'Common experience', said Winfield, 'shows that men are much less likely to outrage the feelings of one against whom they break a contract than those of one upon whom they inflict a tort.'² A procedure which might seem ultimately to presage the deployment of the paraphernalia of a nation's military power, or the threat of it, was inappropriate, except in extreme cases, to sanction a contract voluntarily entered by a private individual who had probably already calculated the risks and set them off against the possible gains.

There was another difficulty. The claims made by these individuals were often absurdly inflated and it could therefore be most impolitic to adopt them unless and until they had been sifted by a suitable tribunal. Except, therefore, where large arrears of claims or other reasons might justify the establishment of a claims tribunal, it was probably the wiser course to eschew contract claims and to move only where a national might appear to have suffered a wrong of a grosser kind. Thus both the coarseness of the available procedures and the absence of a ready method of settling often

¹ See, for example, Lord Palmerston's celebrated dispatch of 1848 to British representatives in foreign States. It is conveniently to be found in Hall's *International Law* (8th ed., 1924), p. 334, n. 1. It is interesting to note that at one time foreign investment was actually frowned upon by Governments. Thus, one paragraph of Palmerston's dispatch reads: 'It has hitherto been thought by the successive Governments of Great Britain undesirable that British subjects should invest their capital in loans to foreign governments instead of employing it in profitable undertakings at home; and with a view to discourage hazardous loans to foreign governments, who may be either unable or unwilling to pay the stipulated interest thereupon, the British Government has hitherto thought it the best policy to abstain from taking up as international questions the complaints made by British subjects against foreign governments which have failed to make good their engagements in regard to such pecuniary transactions.'

² Winfield, *The Province of the Law of Tort* (1931), p. 40.

difficult legal questions, conspired to make Governments shy of the contract claim, and to check the development of international law in that regard.

It is well known that the United States had a set policy of non-intervention in contract claims;¹ and there was, accordingly, an important group of writers who went so far as to maintain that international law did not permit intervention founded only upon an alleged breach of a State contract:² though it may at once be remarked that, apart from cases of a default on a public loan—which tended in any case to be regarded as a distinct legal situation³—it is not easy to find actual instances where the element of breach of an undertaking can be clearly distinguished from a taking of, or damage to, property, or even from an element of delict, with which the contractual element tends in actual cases frequently to be blended. It was no doubt this presence of ambiguity in real situations which made possible the cleavage of opinion in the rationalizations of the commentators.

Whatever the theoretical position it is certain that from time to time the Powers did intervene in pursuance of pecuniary claims; perhaps the best-known instance was the blockade of the Venezuelan ports by Germany, Great Britain and Italy in 1902, to enforce a series of claims, several of which arose out of contracts, and in respect of which the Venezuelan Government had refused both satisfaction and an offer of arbitration. These early precedents, however, must be approached with caution, if only because the instances tend to be somewhat one-sided, in that a resort to self-help was necessarily a case of the strong enforcing a solution on the relatively weak. They are not for that reason necessarily bad law; but the criticism heard from time to time that parts of the law of the responsibility of States may sometimes have the appearance if not the substance of a rationalization of the policies of European powers at a period of European dominance and expansion is a criticism that cannot be left out of account.

¹ See Moore, *Digest* (1906), vol. 6, p. 705: 'It is not usual for the government of the United States to interfere, except by its good offices, for the prosecution of claims founded on contracts with foreign governments.'

² Especially American writers, e.g. Wharton, *A Digest of International Law of the United States* (1886), chap. ix; Borchard, *The Diplomatic Protection of Citizens Abroad* (1915), §§ 109-25; Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (2nd ed., 1945), §§ 303 et seq.; Fenwick, *International Law* (3rd ed., 1948), p. 290; Hackworth, *Digest of International Law*, vol. 5, p. 610; Jessup, *A Modern Law of Nations* (2nd ed., 1949), pp. 104 et seq.

However, Borchard, Hyde and Jessup consider that an arbitrary or confiscatory amendment of a State contract is in itself a tort; the importance of this distinction will be discussed below.

Other American writers have expressed the opinion that the U.S. State practice was dictated by reasons of political expediency, and that the practice of other States and decided cases show that a breach of contract is in itself an international wrong. See, for example, Pomeroy, *Lectures on International Law in Times of Peace* (1866, ed. by Woolsey, 1886), § 213; Davis, *The Elements of International Law* (4th ed. by Sherman, 1916), p. 225; Moore, *A Digest of International Law* (1906), vol. 6, p. 705; Kelsen, *Principles of International Law* (1952), p. 243; Briggs, *Law of Nations* (2nd ed., 1952), p. 664; see also Wetter, 29, *University of Chicago Law Review*, p. 275.

³ See Westlake, *Collected Papers* (1914), pp. 107-9; Borchard, op. cit., § 110; contra see Fischer Williams, *Bibliotheca Visseriana* (1924), vol. 2, p. 22.

After the Venezuelan intervention of 1902, however, there begins a new period in the development of the law, during which the increasingly influential standpoint of the smaller countries, especially of Latin America, took the form of legal doctrines and techniques: the Drago doctrine, the Calvo clause and the like. The Latin American point of view was, of course, particularly pressed at The Hague Conference of 1907 and is reflected in the so-called Porter Convention. It is from this period of controversy and conflict of interests that the modern law begins to take shape.¹

This is not the place to attempt an appraisal of the controversies over the Drago doctrine or the Calvo clause. It may be useful, however, to make two brief observations of a general kind: the first on the Porter Convention of 1907 and the second on the Calvo clause, regarding both these institutions as reflecting at least in some measure the attitude of Governments of the time to State contracts.

The Porter Convention² is, strictly speaking, nothing more than an undertaking, in certain circumstances, not to use force for the collection of contract debts. It does not import any legal obligation on a debtor State to submit to arbitration. It does not even prejudice the question whether general international law permits the use of force for the collection of contract debts.³ But whatever may be the strictly legal meaning of the Convention, as a matter of historical evidence the conclusion is inescapable that the general opinion of the Governments assembled at the conference was that—whether force might be used or not—a State contract might give rise to an obligation of international law.⁴

The interpretation and effect of the Calvo clause is a difficult and controversial question.⁵ But there is one simple aspect of the clause that seems on the whole to have escaped notice: the assumption it necessarily imports

¹ This period has interesting and useful analogies with the present, when another and larger group of new States is tending to question some aspects of the international law they inherit, and which they will no doubt play a part in reshaping.

² 'The Contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals.

'This undertaking is, however, not applicable when the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any *compromis* from being agreed on, or, after arbitration, fails to submit to the award.'

See Scott, *The Hague Peace Conferences of 1899 and 1907* (1909), 2 vols.; and Pearce Higgins, *The Hague Peace Conferences* (1909).

³ An earlier draft which was not accepted implied that in customary law force might be used.

⁴ A similar point was put in the following way by M. Gros when pleading the French case, *Certain Norwegian Loans case*, *I.C.J. Pleadings*, vol. 2, p. 58: 'si les États avaient en 1907 le droit de recourir à la force, c'est-à-dire le droit à la sanction internationale majeure, pour le recouvrement de dettes contractuelles, n'ont-ils pas, en abandonnant par traité le droit de faire usage de la force en cette matière, maintenu au moins le droit de régler leurs différends devant le tribunal dont ils ont déclaré reconnaître la juridiction obligatoire? Sinon, on aboutit à dire, que, ayant renoncé par esprit pacifique à la sanction de la force, les États ont du même coup, et par cette renonciation, perdu le droit au juge.'

⁵ See Lipstein, in this *Year Book*, 21 (1945), pp. 130 et seq.

that, whatever may or may not be the international law obligations arising from a State contract, those obligations can be curtailed by operation of a clause in the contract itself. This assumption is fatal to the thesis that a State contract made in the local law cannot, as a matter of principle, operate in international law. On the contrary, the Calvo clause itself assumes that it can and does. It assumes the possibility of an international law of contract.

It seems reasonable to assume that in this period when the modern law was beginning to take shape, the general opinion as evidenced by practice, was that there is at any rate nothing inherent in the structure of international law, and in the relationship between international law and municipal law, that inhibits the sanctioning of contractual obligations by international law.

II

Before attempting to take the argument any further it is necessary to consider an *a priori* objection to even the possibility of there being a contractual remedy in international law for the kind of contract under discussion. It is sometimes suggested that where a State contract is governed by the local municipal law as its proper law, there cannot in the juridical nature of things be any question of a claim on the contract arising at international law: the contract is created in, and subsists in the local law and it ineluctably follows that it may be terminated in the local law whether by legislation or other lawful process. And in this event, however much the situation may have disappointed the expectations of the alien contractor, there is no breach of contract and therefore nothing, in a contractual sense, to complain of. The contrary view, says Dr. Mann,

'stems from a fundamental error which would not have arisen if public international lawyers had had due regard to the character and teachings of private international law: in the type of case where there is room for the problem at all under customary public international law, no breach of contract in fact occurs, and, consequently, the principle of *pacta sunt servanda* is not infringed. . . . Contracts are governed by the law determined by the private international law of the forum. That law "not merely sustains but because it sustains, may also modify or dissolve the contractual bond". These words of Lord Radcliffe express a principle of universal application.'¹

The contractual nexus is thus regarded as a closed system within its own proper law. There can be no 'breach' of contract unless there is a breach in the proper law (and there is clearly none where the contracting State has ended the contract by a change in the proper law through constitutional means). There cannot therefore, the argument proceeds, be any international

law remedy for breach of contract because there *is* no breach of contract. The only possible international remedy is, therefore, one founded in a distinct international delict, such as, for instance, denial of justice. It cannot be a remedy for breach of contract because breach of contract there is none.

This argument, it is respectfully submitted, rests upon a fallacy. For there is no reason at all to prevent international law from holding that what is no breach of contract in the proper law is nevertheless deemed to be a breach of contract for the purposes of international law; just as, indeed, common sense may suggest there may be a breach of contract where a technical 'breach' in the proper law has been evaded by the device of legislation. To hold otherwise is surely to regard the proper law, though municipal law, as having the primacy over international law. But the boundaries of public international law cannot be subjected to definition by principles of municipal law or of private international law without denying the validity of one of the axioms of international law. This is not to suggest, of course, that the rule of the proper law and the principles of private international law are invalidated on their own plane.

Perhaps an example will assist. Let us suppose facts similar to those of the *Losinger* case,¹ where the contract includes an arbitration clause and the contracting State later enacts legislation which confines all disputes arising under State contracts to the local courts. Clearly there is here no breach of contract in terms of the local law which is the proper law of the contract. But there is no requirement of juridical reason which inhibits international law from providing that this legislation is a breach of the international law governing State contracts: whether it is then referred to as a breach of contract or as an international delict is neither here nor there. This is not to assert that there is or is not in fact such a remedy existing in international law; the aim for the moment is only to argue that there *could* be such a remedy, and that there is nothing in the structure of international law or of its relationship with municipal law or with the general principles of private international law that would prevent it; that, supposing the *Losinger* case had gone on to judgment, it cannot be said to be juridically inconceivable that the court could have found that there had been a breach of the contract and afforded a remedy accordingly.

Admittedly it could in principle be, that the hegemony of the proper law in these cases is required by a rule of international law, that this in fact is part of the reserved domain of domestic jurisdiction, and that the principle of private international law in this matter coincides at all its limits with the rule of public international law. But even if the validity of this logically possible proposition could be demonstrated from international jurisprudence,

¹ *P.C.I.J.*, Series A/B, No. 67.

it would, like other rules of international law—even those defining the reserved domain—be subject to change, depending ‘upon the development of international relations’.¹ And there is very recent authority of the International Court of Justice that even in a matter such as nationality—which is in principle created and determined by the municipal law exclusively—a particular conferment of nationality admittedly entirely valid in the only relevant municipal system of law may, nevertheless, be of non-effect as a nationality for certain purposes of international law.²

For the question an international tribunal has to ask is not merely what is the proper law of a transaction and what is the legal result according to that law; but also whether this legal result is in accordance with the rule of international law. As Sir Hersch Lauterpacht put it in a Judgment *à propos* this very question of contracts made between the State and aliens:

“The question of conformity of national legislation with international law is a matter of international law. The notion that if a matter is governed by national law it is for that reason at the same time outside the sphere of international law is both novel and, if accepted, subversive of international law. It is not enough for a State to bring a matter under the protective umbrella of its legislation, possibly of a predatory character, in order to shelter it effectively from any control by international law. There may be little difference between a Government breaking unlawfully a contract with an alien and a Government causing legislation to be enacted which makes it impossible for it to comply with the contract.”³

III

The remedy for an ‘international delict’

A corollary of the view that the proper law of a State contract is a kind of sealed system insulated from international law is the inference that an international remedy can exist only where the contracting State has

¹ *Tunis-Morocco Nationality Decrees case*, *P.C.I.J.*, Series B, No. 4, p. 24.

² *Nottebohm case*, *I.C.J. Reports*, 1955, p. 21.

³ *I.C.J. Reports*, 1957, p. 37. See also *P.C.I.J.*, Series A, No. 7, at p. 19: ‘from the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.’

Dr. Mann, *loc. cit.*, at p. 581, deals with this argument in the following way: after rejecting the view that international law can assert that there is a breach of contract in the kind of case where an ostensible breach has been covered by a legislative change in the proper law, he goes on to acknowledge that an argument in support of this rejected view ‘might be derived from the well-known principle that as a matter of public international law no state can rely on its own legislation to limit the scope of its international obligations’. This he counters by the argument that ‘this rule contemplates obligations governed by public international law and has no bearing upon the scope of obligations which are subject to a system of municipal law, such as the law of the debtor state’. But this surely is to beg the question at issue. It is an assertion that international law leaves this matter entirely within the reserved domain of municipal law. Yet this is exactly what has to be proved.

committed an international *delict*, distinct from and, formally at least, independent of any supposed breach of contract; such a delict for example as a denial of justice.

Now in a formal sense this argument is unexceptionable at any rate for traditional international law; and for this reason. Whatever might be the position today it is certain that an individual was not a subject of traditional international law. International law was therefore incapable by reason of its very structure of accommodating any notion of reciprocal obligations arising at international law between a State and an individual from their contract. For the protection of the individual, the introduction of the protecting State was necessary; and, therefore, there had to be a transformation of the claim out of the realm of obligations fixed by the parties in contract, to the realm of general duties owed by one State to another.¹ And this is precisely a transformation from the realm of contract to the realm of tort or delict.² This is the fundamental reason why the traditional law 'accepted almost as a dogma the idea that the mere non-performance by a State of its obligations under a contract with an alien individual does not in itself necessarily give rise to international responsibility'.³ The classical law was incapable of providing any remedy other than a remedy for delict. So the argument under discussion is thus far not merely correct: it is a truism.

We may, however, be put on guard against assuming that this is the end of the matter when we observe that there is nothing here that is peculiar to State contracts. This transformation of the individual's claim into a different claim by his protecting State is still necessary even if the wrong of which he complained was a taking of his property; or for that matter where the wrong to the individual is a delict; for even here the claim of the State is legally and formally distinct from the claim of the individual.

But there is some danger in attempting to apply the categories of a sophisticated municipal system—such as contract, delict, or property—too rigidly to a relatively immature portion of international law; for thereby we may easily lose sight of the substance of the matter.⁴ The absence in international law of what might be called a 'form of action' in contract does

¹ As is well known, the distinction between the claim of the individual and the claim of his State is authoritatively discussed in the *Mavrommatis Concessions* case, *P.C.I.J.*, Series A, No. 5; and the *Chorzów Factory* case, *ibid.*, No. 7.

² See Winfield, *The Province of the Law of Tort* (1931), p. 40, for the essential difference between contract and tort: 'At the present day, tort and contract are distinguishable from one another in that the duties in the former are primarily fixed by law, while in the latter they are fixed by the parties themselves. Moreover, in tort the duty is towards persons generally, in contract it is towards a specific person or persons.'

³ See International Law Commission, *Fourth Report on International Responsibility*, by García Amador, Special Rapporteur, A/CN.4/119 (26 February 1959), in *Year Book of the International Law Commission* (1959), vol. 2, p. 30.

⁴ See the warning by Eagleton, *The Responsibility of States*, p. 166, n. 24.

not necessarily mean that there is no remedy which relates directly to the terms of the contract.

It is true, of course, that there are cases—perhaps even the most firmly established and least controversial class of cases—where the international wrong which forms the basis of a protecting State's claim is indeed a wrong or delict which is independent of contract both in form and in substance: where it is truly a supervening delict to which the contractual situation is irrelevant except in so far as it may have provided the occasion for the commission of the wrong. Such is the case of a denial of justice in the strict and narrow sense of the word; and such a claim might in some instances be sustained almost without need so much as to refer to the contract.

But the thesis that this is necessarily the position¹ is, it is submitted, without foundation. This is to fall into the error of erecting the absence of a remedy into a dogma, and supposing that where no remedy is, none could be. This easily ripens into the error of continuing to suppose that no remedy can exist even where one is already provided. And, indeed, the law seems to the writer already to have passed this stage of development. The authorities are mostly² ready to agree that an international delict may be committed where the termination of a State contract is 'arbitrary'. Opinions may differ on what is meant by 'arbitrary' in this connexion, but one thing is quite certain: it is impossible for a court to decide whether there has been an 'arbitrary' interference with any particular contract without looking at the actual terms of the contract. What was agreed between the parties in the contract is inescapably a factor in deciding whether there has been an arbitrary interference with the expected course of the contractual relationship or not. The result may be in form 'an international tort of the traditional type'; but it is also in substance at least partly contractual because the delict is not here independent of the terms of the contract. The essence of the wrong is not what the State has done to an individual who chanced also to have a contractual relationship with the State; the essence of the wrong is what the State has done in respect of that very relationship.³ Thus it seems that we have here already a well-established remedy which, though delictual in form, is in substance partly contractual. The layman would think of it as a remedy for contract and, it is submitted, he would not err in so doing. Thus we may find that

¹ e.g. see Dr. Mann, loc. cit., p. 582: 'where the debtor state does wrong to its alien creditor, public international law may impose a delictual liability. The existence of a tort towards the creditor's state is independent of any question of breach of contract' (italics supplied).

² See e.g. Mann, loc. cit., p. 575; for a general discussion of 'arbitrariness' as a general ground of liability, see Amador, loc. cit., chapt. i, § 5.

³ Cf. the *International Fisheries Co.* case, Mexico-U.S. Gen. Claims Commission, *U.N.R.I.A.A.* (1931), vol. 4, p. 691, at p. 699: '... The cancellation in question ... was not an arbitrary act, a violation of a duty abhorrent to the contract and which in itself must be considered as a violation of some rule or principle of international law ... there is no ground for an international claim if the annulment of the contract has been made in accordance with its express terms.'

international law has a law of contract even though it may be found so to speak secreted in the interstices of the traditional delictual remedy.¹

IV

Exhaustion of local remedies and the denial of justice

Before leaving the delictual aspect of these remedies it is necessary to make a brief excursion into two closely related matters: the rule requiring the exhaustion of local remedies, and the concept of the denial of justice. It is elementary that, in the absence of some provision excluding the rule, the primary requirement in a case arising from an alleged breach of a State contract must be the exhaustion of local remedies where local remedies are available. Everyone would agree that, if the attempt to use the local remedies results in a denial of justice, there is an international remedy. But this statement only darkens counsel in the absence of further definition. It is necessary to know (a) whether the remedy for a denial of justice is exclusive, in the sense that one who has to use the local remedies on the contract can thereafter complain on the international plane only for a denial of justice and for no other reason; and (b) what in any case is comprised by the term denial of justice? Does it cover only denial of access to the courts or the corrupt or discriminatory administration of justice; or does it, as it did for Grotius, include the case 'if judgment be given plainly against right?'² There has sometimes, in the past, been a tendency, especially amongst South American writers, to answer both these questions restrictively.³

There is, of course, plenty of good authority for giving a much wider construction to the term denial of justice, so as to include indeed not only the doings of the courts, but the whole remedial process;⁴ but the important question is whether, where local remedies have first to be used, there is thereafter the possibility of international claims other than those in

¹ For the English lawyer there is of course nothing novel in the development of a law of contract by using the law of tort as a vehicle.

² *De jure belli ac pacis*, ii, ch. ii (Whewell's translation). For discussions of the meaning of the term denial of justice see Fitzmaurice, this *Year Book*, 13 (1932), p. 93; and Freeman, *International Responsibility of States for Denial of Justice* (1938).

³ e.g. in the *Guerrero Report* to the 1930 Hague Codification Conference where denial of justice seems to mean only the refusal of access to the courts, or of the courts to hear the case or pronounce judgment; 1927, V.C.196.M.70.

For discussion of these restrictive definitions see Borchard, *American Journal of International Law*, 20 (1926), p. 738; and *ibid.*, 23 (1929), Spec. Supplement.

⁴ See Fitzmaurice, *loc. cit.*, p. 108: '... at any rate for all practical purposes, every injury involving the responsibility of the State committed by a court or judge acting officially, or alternatively every such injury committed by any organ of the government in its official capacity in connexion with the administration of justice, constitutes and can properly be styled a denial of justice, whether it consists in a failure to redress a prior wrong, or in an original wrong committed by the court or other organ itself.'

respect of wrongs committed by the local courts; whether all or some of these wider claims are to be included within the definition of denial of justice is a mere question of terminology and a matter of taste.

Lord McNair, dealing with the rule that a 'merely erroneous' judgment by a local court does not amount to denial of justice, says:

'It has been seen that mere error in a judgment is not enough. There is, however, some evidence of two exceptions to this rule, or, rather, of two cases in which the rule does not apply, because the wrong inflicted upon the foreign party is not a "denial of justice" but a direct breach of international law affecting him and creating in his State a right to redress. They are:

- (i) when the judgment of the foreign court is based on a wrong interpretation of a treaty or other international instrument, or involves the breach of a rule of customary international law;
- (ii) when the foreign court had no jurisdiction, either because it was irregularly constituted or for some other reason.'¹

Thus there is strong authority for rejecting the suggestion that the local courts are a closed system from which there is no exit into the international sphere unless the courts grossly misbehave themselves.² This is so in particular where the defendant State has committed an original, or direct, breach of international law; here there is a substantial if not a formal identity between the wrong complained of before the local courts and the wrong complained of on the international plane.³

But there is a difficulty in applying this to the case of the claim arising from a State contract subject to the local municipal law as its proper law. For here must not the judgment of the local courts on the effect of the local law be regarded as conclusive? It is this consideration, of course, which underpins the theory that the alien contractor in this kind of case has no international remedy in respect of his contract though he may have a remedy if the State commits towards him an independent, supervening tort; and the notion that it is of great importance therefore to stress the independence of the delictual offence from the question of breach of contract.

But this is to reach the place we had already reached in the last section by a different route. It is obviously true that an action for breach of contract

¹ *International Law Opinions* (1956), vol. 2, p. 311. There is quite a lot of authority for this view of the matter from South America too. Thus, for example, in an Argentinian note to the Italian Government concerning the arbitration treaty of 1907 between those countries it was said that a foreign State is not obliged to accept the judgment of the local tribunals if it believed they were not competent, or if they had decided contrary to the principles of international law. See Moore, *Proceedings of the American Society of International Law* (1915), p. 19.

Cf. also Article XXVI of the Treaty of Friendship, Commerce and Navigation between Peru and Cuba, 1912; see *American Journal of International Law*, 7 (1913), Suppl. Also Article 10 of the Treaty of Commerce between Bolivia and the United Kingdom, 1911, *ibid*.

² For a rejection of the narrow view of a denial of justice, see the *Solomon* claim (1934), between the U.S. and Panama (6 *U.S. Dept. of State Arbitration Series*, p. 457).

³ See Judge Bagge's Award in the *Finnish Ships* case, *Annual Digest*, 1933-1934, case No. 91; see especially pp. 234-5.

in the sense of the local law cannot be, as it were, continued directly into the international sphere as if by way of an appeal from the local courts: the situation requires further definition in terms of international law wrongs before any claim in international law can proceed. If it is merely that there is an honest dispute as to the meaning of the contract according to the local law at the time it was made, the interpretation of the local courts is likely to be final in the absence of a denial of justice in the strict sense.¹ But it does not at all follow that the international claim must be for a wrong independent of the contractual situation and different in nature from a claim on the contract—though, of course, it may be. Once it is admitted that there may be a valid international claim where ‘the defendant State whose law governs the contract has, in the exercise of its legislative or executive powers, taken measures specifically to terminate or interfere with the particular contract in issue’,² this may well be traditionally a claim which is delictual in form, but the substance of the matter is surely a complaint that there is a breach of contract in the sense of international law, and one might as well say so. The claim may even involve a necessary consideration of the local law; for it is not possible to say there has been an arbitrary termination of the contract except after looking at the contract; and to look at the contract is to look at the local law in which it has its being. But the international claim will not be dependent on showing that there was a breach of contract in the sense of the local law (which might simply be untrue) but that the local law is not in accord with the requirements of international law.

V

These tentative conclusions may now be tested by turning to the question of reparation, and asking how far international tribunals, when adjudicating in this kind of ‘delictual’ action, do in fact make awards that bear some analogy to a judgment in damages for breach of a contract.

At first sight this inquiry may seem unpromising because international law certainly has no forms of action, and the classical statements concerning indemnity for an international wrong tend to be in quite general terms: to take perhaps the best known, the Permanent Court of International Justice

¹ See, for example, Dr. Mann, *loc. cit.*, pp. 574–5. Dr. Mann puts the case where there is a dispute between the contracting parties about the meaning of the contract. ‘If the debtor state’s interpretation of the legal position is mistaken, a “breach of contract” may have occurred, yet the case is unlikely to give rise to a claim for “breach of contract” in international law. In practice the point in issue will be decided judicially, either in the ordinary courts of the debtor state or by arbitration, and it is normally only in the event of a denial of justice that an international case will become possible and necessary. It will then be founded upon that denial of justice rather than breach of contract.’

This case Dr. Mann then contrasts with the one where ‘the international tort consists in the confiscatory, discriminatory or arbitrary character of the exercise of the defendant state’s sovereignty or, in short, in the *abus de droit* of which it is guilty and which is sufficient to attract its liability’.

² *Ibid.*, p. 575.

in the *Chorzów Factory* case said: 'It is a principle of international law that the reparation of a wrong may consist in an indemnity corresponding to the damages which the nationals of the injured State have suffered.'¹ And for that matter, even more sophisticated systems fail to make any clear distinction between the measures of damages for tort and contract; except where there is a penal element in the former. We would not expect to find, therefore, that international law has rules concerning the measure or remoteness of damages, which are differentiated in terms that can be related directly to the differences between claims in contract or tort or property.²

Nevertheless, in so far as the rationale of all reparation is to restore the *status quo ante* as far as money can do so,³ the assessment of reparation must take the contractual situation into account. As it was expressed in the *Shufeldt* case, to take a well-known example: 'the *damnum emergens* is always recoverable, but the *lucrum cessans* must be the direct fruit of the contract and not be too remote or speculative'.⁴

A usual technique, especially in arbitrations, has been to regard the abrogated contract or concession as being itself an acquired property right which has been taken by the Government. 'This type of rationale', we are told, 'has been utilized particularly in connexion with non-performance by the State of an obligation to pay money where the contractual obligation of the claimant has already been performed.'⁵ It is perhaps expressed most clearly in the *Singer Sewing Machine* (American-Turkish) claim:

'... International law does not prescribe rules relative to the forms and legal effect of contracts, but that law may be considered to be concerned with the action authorities of a government may take with respect to contractual rights. It is believed that in the ultimate determination of responsibility under international law, application can pro-

¹ Series A, No. 17, at p. 27.

² It is not often that one finds a claim in contract unassociated with a claim in property; though the *Landreau* claim, *U.N.R.I.A.A.* (1922), vol. 1, p. 352 comes near to it. Here the right involved was in effect a royalty on resources discovered by Landreau and to be exploited by the State. The Award was made on the basis of a *quantum meruit*—an essentially contractual remedy.

In the *Illinois Central R.R.* claim, *U.N.R.I.A.A.* (1926), vol. 4, p. 134, the Award was, indeed, for the contract price of railway engines sold and delivered to the Mexican Government. But this Award is not conclusive for the point under discussion because the sum was admittedly owed under Mexican law. The only substantial point at issue, therefore, was one of jurisdiction. Nevertheless, it is significant that the commissioners insisted on the international character of this contractual claim: speaking of claims as between a citizen of one country and the Government of another country acting in its civil capacity, they said: 'These claims too are international in their character, and they too must be decided "in accordance with the principles of international law", even in cases where international law should merely declare the municipal law of one of the countries to be applicable.'

³ See Schwarzenberger, *International Law* (3rd ed., 1957), vol. 1, p. 654.

⁴ *American Journal of International Law*, 24 (1930), p. 799 at p. 819 (emphasis supplied). In this case also a claim for mules, horses, boats, tools and the like was allowed, not because these had been taken by the Government but because, *after the cancellation of the concession*, they were useless.

⁵ See *The Status of Permanent Sovereignty over Natural Wealth and Resources*, a study by the United Nations Secretariat, A/AC.97/5, Rev. 1 (27 December 1960), at p. 280.

perly be given to principles of law with respect to confiscation, and that the confiscation of the property of an alien is violative of international law. If a government agrees to pay money for commodities and fails to make payment, the view may be taken that the purchase price of the commodities has been confiscated, or that the commodities have been confiscated, or that property rights in a contract have been destroyed or confiscated.¹

In this kind of case it is obvious that, however it is put, the reparation due comprehends the plaintiff's rights under the terms of the contract. It is in effect the equivalent of damages for breach of contract.

There remains a consideration of some consequence. Whatever may have been the position half a century ago, it is undeniable that international law today permits a State, subject to certain conditions, to expropriate or nationalize alien property and enterprises, provided of course an 'adequate, effective and prompt compensation' is paid. What are the precise limits of this right of nationalization is a question that need not be entered upon here; it is sufficient for present purposes that the right exists. For the question that now presents itself is this: does the right of nationalization include the right to determine a contract or concession? And, if it does, what is the impact of this right upon the question of international remedies for contract?

There is a body of opinion which would deny the existence of any right to expropriate where to do so would be repugnant to a State contract;² if this is the law, *cadit quaestio*. Without attempting to resolve this question, let it be assumed for the purposes of this argument that a State does in general have a right to end or change a contract where the right to nationalize subject to the usual conditions has arisen. This might be thought at first sight to constitute a serious limitation on any supposed binding character of State contracts in international law. It must be remembered, however, that as most authorities agree, international law requires the expropriation to be accompanied by the payment of adequate compensation to render it lawful.³

The question then arises: how does the measure of the compensation due for a lawful expropriation compare with the measure of the reparation due for an unlawful act? In particular, does compensation cover loss flowing from a breach of contract; or, as some would prefer to put it, can a contract be regarded as property for the purposes of assessing the compensation?⁴

¹ Nielsen, *American Turkish Claims Settlement* (1937), p. 490. Also the *Cook* case (*U.S. v. Mexico*), *U.N.R.I.A.A.*, vol. 4, p. 213; *Hoffman and Steinhardt* claim (*U.S. v. Turkey*), Nielsen, *op. cit.*, p. 286.

² See International Law Commission, *Fourth Report on International Responsibility*, by Garcia Amador, A/CN.4/119, pp. 35 and 76.

³ See, for example, *Chorzów Factory* case, *P.C.I.J.*, Series A, No. 17; the *de Sabla* case, *Annual Digest*, 1933-1934, case No. 92; the *Norwegian Claims* case, *U.N.R.I.A.A.* (1922), vol. 1, p. 307.

⁴ General Assembly Resolution (V), 2 December 1950 about Eritrea recommended: '7 (c) . . .

It is no doubt true to say that reparation and compensation differ from each other in principle:¹ yet both aim at a restoration of the *status quo ante*.² There are, of course, differences. Compensation has certainly no element of 'satisfaction'. Other differences were noted in the *Chorzów Factory* case.³ The majority Judgment in that case makes a sharp distinction between an exercise of a right of expropriation—'to render which lawful only the payment of fair compensation would have been wanting'—and an unlawful seizure for which the compensation due 'is not necessarily limited to the value of the undertaking at the moment of dispossession, plus interest to the day of payment'. Failure to make this distinction would, said the Court, 'be tantamount to rendering lawful liquidation and unlawful dispossession indistinguishable in so far as their financial results are concerned'.⁴

The principle of this distinction is explained in the following way. The reparation for an illegal act

'must as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if the act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it.'

This formula is contrasted with 'the just price of what was expropriated' which is payable in respect of a lawful expropriation.⁵ On the facts of the case, however, the difference seems to have amounted to little more than a question of the time at which the value of the seized undertaking should be assessed. Since in this case the damage should be, as far as maybe, equivalent to restitution, so as to place the companies 'as far as possible in the economic situation in which they would probably have been if the seizure had not taken place',⁶ it followed, in the Opinion of the Court, that the reparation must be the value of the undertaking 'at the time of the indemnification, which value is designed to take the place of restitution which has become impossible'. It therefore included any increase in value between the time of seizure and the time of the indemnification, as well as any 'loss sustained as the result of the seizure'. Compensation for a lawful expropriation, on the other hand, was limited to an assessment at the time of the expropriation.⁷

No one shall be deprived of property, including contractual rights, without due process of law and without payment of just and effective compensation.'

¹ See Kaackenbeeck, this *Year Book*, 17 (1936), p. 16.

² See Schwarzenberger, *op. cit.*, p. 660.

³ *Ibid.*, pp. 46 et seq.

⁵ *Ibid.*

³ *P.C.I.J.*, Series A, No. 17.

⁶ *Ibid.*, p. 49.

⁷ The same point is expressed in M. Rabel's observations: 'If the expropriation effected by the Polish Government had been lawful, the compensation due by it therefore should correspond to the value of the undertaking at the time of dispossession, plus interest on this sum to the date of payment. The judgment goes on to say that this limitation of the compensation is not admissible in the present case because the Polish Government had no right of expropriation and that,

Further light is thrown upon the majority decision by Lord Finlay, who, in his Dissenting Opinion, rejects it. In his opinion, the party who has suffered an unlawful act has a choice of remedies. He may claim actual restitution of the property taken, or he may claim damages. But the party that opts for damages may not, in Lord Finlay's opinion, 'claim damages on the footing that it is right that he should have the enhanced value, if any, that he would have got if he had pressed his claim for restitution'. On the contrary, the damages 'must still be assessed according to the general rule—as at the time of the wrong'; though on this basis, said Lord Finlay, 'it may be that damages so assessed *will amount to no more than the amount which the Polish Government would have had to pay if it had been able to expropriate the undertaking in conformity with the terms of the Geneva Convention*; but this is immaterial'.¹

The Opinion of the Court therefore allows that the compensation payable in respect of a *lawful* expropriation would here have been the real value of the undertaking at the time of dispossession; the only important differences between this and the reparation payable in respect of an unlawful seizure appear to be (a) that the plaintiff may in this case ask for specific restitution, and (b) if he does not, or if restitution be impossible, he may claim a sum representing any enhanced value the undertaking may have acquired between seizure and indemnification. The point that emerges, then, is that the compensation in respect of expropriation or nationalization, though maybe limited in this or that respect, is often not very different in *quantum* from reparation; and where the undertaking is the creature of a concession, the terms of the concession must be material to the assessment of that compensation.²

Certainly there are not wanting cases where tribunals have awarded compensation for the expropriation of a contract and have assessed it on much the same basis as reparation. In the *Delagoa Bay Railway* case the Tribunal stated that compensation was payable regardless of whether or not the exercise of power was arbitrary and equated the situation to one of lawful expropriation.³ Even the cancellation of a contract under the right

consequently, the German Government is entitled to be compensated for all the losses suffered by its nationals as a result of the seizure of the undertaking.

'Being convinced of the justice of these arguments, I have accepted them, believing that the principles resulting from the unlawful nature of the expropriation, . . . *are applicable in practice wherever the damage caused appears greater than the compensation which would be due if expropriation had been lawful*, as may be the case in the present suit' (loc. cit., p. 66 (italics supplied)).

¹ Loc. cit., pp. 70–71 (italics supplied).

² The case is conceivable, of course, where the terms of the contract serve to diminish rather than augment the assessment of the damage; cf. *P.C.I.J.*, Series A, No. 17, p. 55.

³ La Fontaine, *Pasicrisie internationale*, p. 397, at p. 402: 'Que l'on veuille, en effet, taxer l'acte gouvernemental de mesure arbitraire et spoliatrice ou l'acte souverain dicté par la raison d'État à laquelle toute concession de chemin de fer demeurerait subordonnée, voire même qu'on considère le cas actuel comme un cas d'expropriation légale, toujours est-il que cet acte a eu pour effet de déposséder des particuliers de leurs droits et privilèges d'ordre privé à eux conférés par

of self-preservation has been held to require such a compensation. Thus in case of the *Company General of the Orinoco* it was said:

'As the Government of Venezuela, whose duty of self-preservation rose superior to any question of contract, it had the power to abrogate the contract in whole or in part. It exercised that power and cancelled the provision of unrestricted assignment. It considered the peril superior to the obligation and substituted therefor the duty of compensation.'¹

In the *Robert May* claim the Tribunal went further:

'If, for imperative reasons of state, the railroad had been withdrawn from May before he had completed the term fixed by his contract, he would have been entitled to all the profit to be derived from the railroad until the completion of the term.'²

It is, of course, possible to take a more restrictive view of the compensation due in cases where the State has a right to expropriate or nationalize. It is not the intention to enter upon that controversy here. The aim has been simply to show that there is a strong line of authority even in traditional international law to the effect that the provisions of a contract or concession are relevant both in the assessment of reparation and of compensation. And, indeed, if *any* compensation is due where interference with a contract is by virtue of an international law right, the exaction of reparation where there is no such right would seem to be an *a fortiori* case. It begins to look in fact as though there is a considerable body of international law concerning State contracts obscured under cover of claims for delict or for the taking of alien property. ✓

VI

It is time now to turn to the important principle of acquired rights. That the idea of acquired or vested rights³ is part of public international law is a proposition that has received the sanction of numerous authorities including the Permanent Court of International Justice and is now hardly open to question;⁴ further, there is good authority for the view that acquired rights are not confined to the notion of property in its narrowest sense, but also include rights derived from contract or concession.⁵

la concession, et que, à défaut de dispositions légales contraires—dont l'existence n'a pas été alléguée dans l'espèce—l'État, auteur d'une telle dépossession, est tenu à la réparation intégrale du préjudice par lui causé.'

¹ Ralston, *French-Venezuelan Claims Commission* (1906), p. 244.

² *Guatemala v. U.S.* (1900), *Foreign Relations of the United States* (1900), p. 659, at p. 672.

³ See Kaeckenbeeck, in this *Year Book*, 17 (1936), pp. 1 et seq.

⁴ See García Amador, loc. cit., p. 4: 'The report thus starts from the premise that respect for private rights of a patrimonial nature constitutes one of the principles of international law governing the treatment of aliens. The traditional views on this principle may admittedly need revision, but, in the present state of development of international law, its existence and validity cannot be questioned.'

⁵ See, for example, *German Interests in Polish Upper Silesia* case (merits), *P.C.I.J.*, Series A, No. 7; *German Settlers in Poland* case, *P.C.I.J.*, Series B, No. 6; *Niederstrasser v. Poland*, *Schiedsgericht für Oberschlesien*, vol. 2, Nos. 3-4; *Goldenberg and Son v. Germany*, *U.N.R.I.A.A.*,

The notion of acquired rights is, however, helpful only up to a point; for it is a concept the content of which cannot be defined *a priori*, and its scope must depend therefore largely upon judicial elaboration and decision. It is, in fact, an idea which is in some measure of a question-begging character. Nevertheless, the principle of acquired rights provides an instructive way of asking the question which rights international law will protect, because it expresses so well the nature of that link between international law and municipal law which is at the heart of the problem that arises wherever a right, initially created and subsisting within municipal law, is protected by international law. In the words of Kaeckenbeeck:

'However variously defined, the notion of vested rights has in legal theory and in municipal law been consistently resorted to for solving the ever-recurring difficulties which arise out of the collision of laws in respect of time. In this connexion the principle of respect for vested rights appears, so to say, as the other side of the principle of non-retroactivity of laws.'¹

Thus, it may be thought of perhaps as a kind of legal ratchet which, where it operates, prevents the municipal law from going back on what it has itself created.² Hence, the notion of acquired rights thus defined explains why and how it is possible for international law to control and protect in certain respects a State contract whose proper law is the municipal law of the contracting State.³ As Professor Rousseau so pointedly expresses it:

vol. 2, p. 909; *Sopron-Koszeg Local Railway Co. case*, *Annual Digest*, 1929-1930, case No. 34. And see also Professor Verdross in *Recueil des cours*, 37 (1931-III), p. 364.

It is in the law of State succession that the doctrine of acquired rights is most firmly established. 'The doctrine of acquired rights', says Dr. O'Connell, 'is perhaps one of the few principles firmly established in the law of State succession, and the one that admits of least dispute': *Law of State Succession* (1956), p. 104. In the recent *Lighthouses case*, the Tribunal refers to: 'les principes généraux du droit international public commun, prescrivant le respect des droits patrimoniaux acquis en cas de changements territoriaux'; see *Affaire des Phares, France v. Greece* (1956), p. 122. The United Kingdom Memorial in the *Anglo-Iranian Oil Co. case*, argued from the recognition of concessions as acquired rights in cases of succession, 'that the binding nature of concessions on the original grantor State is an *a fortiori* case: if that is the position as between the successor State and its predecessor, then *a fortiori* the principle of respect for acquired rights in the matter of concessions must be regarded as binding upon the Government or Governments of the State granting them when there has been no change of sovereignty over the territory where the concession operates'. *I.C.J. Pleadings*, pp. 84-85. See also Schwarzenberger, *Current Legal Problems* (1952), p. 312.

It is worth remarking that in the *Oscar Chinn case*, *P.C.I.J.*, Series A/B, No. 63, both the Court and the parties seemed to have no difficulty in accepting the notion that acquired rights under concession contracts may be protected by general international law although it was decided that no such right had in fact been created in the case before the Court.

¹ Loc. cit., p. 2.

² Cf. Garcia Amador, loc. cit., p. 8: 'The fact that the acquisition of patrimonial rights is governed, wherever there are no treaty provisions on the subject, solely by municipal legislation has not prevented international law from imposing on every state the obligation to respect those rights once they have become "acquired".'

³ In the recent Award in the dispute between Saudi Arabia and the Arabian-American Oil Company (Aramco), the notion of acquired rights was relied upon very strongly by the Tribunal. Thus, in one passage of the Award the Tribunal says:

'The Tribunal holds that the Concession has the nature of a constitution which has the effect of conferring acquired rights on the contracting parties. By reason of its very sovereignty within its

'Un autre principe fondamental du droit civil a été élevé par la jurisprudence internationale à la hauteur d'un principe général du droit; c'est celui du respect des droits acquis, dont l'application déborde le cadre du droit international privé.'¹

VII

Pacta sunt servanda

Enough has now been said to show that international law, whether through the vehicle of the traditional delictual form, or through the principle of acquired rights, or even the doctrine of abuse of rights,² comprises a doubtless incomplete but still formidable body of law which controls the discretion of States with respect to their contracts with aliens. Is it not justifiable, therefore, to recognize this frankly as a law of contract and subsume the whole under the general principle *pacta sunt servanda*? Professor Wehberg, lending his weighty authority to such a conclusion, says:

'We have described above the rule of *pacta sunt servanda* as a general principle of law that is found in all nations. It follows, therefore, that the principle is valid exactly in the same manner, whether it is in respect of contracts between states or in respect of contracts between states and private companies. Whether one regards, with Verdross, the contracts of a state with a foreign company for the purpose of creating a concession as being quasi-international law agreements, or whether one ascribes to them another character, the principle of sanctity of contracts must always be applied.'³

As an affirmation of one of the great general principles of law this is unassailable. However, as a working rule to be applied to State contracts the maxim may perhaps require some further definition. Admittedly this principle must be regarded as fundamental to any law of contract, but it is too general to be serviceable without further definition in relation to territorial domain, the State possesses the legal power to grant rights which it forbids itself to withdraw before the end of the Concession with the reservation of the Clauses of the Concession Agreement relating to its revocation. Nothing can prevent a State, in the exercise of its sovereignty, from binding itself irrevocably by the provisions of a concession and from granting to the concessionaire irrevocable rights. Such rights have the character of acquired rights. Should a new concession contract incompatible with the first, or a subsequent statute, abolish totally or partially what has been granted by a previous law or concession, this would constitute a clear infringement, by the second contract, of acquired rights or a violation, by the subsequent statute, of the principle of non-retroactivity of law, with the only exception of rules of public policy. This is because a legal situation acquired by virtue of a previous special statute cannot be abrogated by a subsequent statute—*generalia specialibus non derogant*—unless the legislator has expressly given retroactive effects to such statute, which the State cannot do in respect of concessions, without engaging its responsibility.'

¹ *Principes généraux du droit international* (1944), p. 95.

² See Mann, loc. cit., p. 575.

³ See *American Journal of International Law*, 53 (1959), p. 775, at p. 786. See also Bin Cheng, *General Principles of Law* (1953), who links this with the principle of good faith: 'It cannot be that good faith is less obligatory upon nations than upon individuals in carrying out agreements' (at p. 112); and again, '*pacta sunt servanda*, now an indisputable rule of international law, is but an expression of the principle of good faith which above all signifies the keeping of faith, the pledged faith of nations as well as that of individuals. Without this rule, international law as well as civil law would be a mere mockery' (p. 113).

particular classes of situation. It needs to be given a content. In particular, the question immediately arises of the precise meaning of the principle in the context of this general problem of the relationship between international law and the proper law of the contract: for in the difficult case, where the contract is alleged to have been terminated by operation of some change in the proper law, there is after all, according to the proper law, no breach whatever of the principle *pacta sunt servanda*. The principle does not, therefore, without further definition, indicate which the cases are where, though there is no breach in the proper law, international law will, nevertheless, view that state of the proper law as being itself a breach of the requirements of international law in respect of State contracts.

In order to yield an answer to this problem, the principle *pacta sunt servanda* needs therefore to be linked with the principle of acquired rights and in particular that aspect of the principle of acquired rights which operates against retroactive legislation. In other words, though the contract is naturally to be interpreted in the light of its proper law, this means the proper law as it was at the time the contract was made. The point is expressed in a familiar passage in Professor Sauser-Hall's argument in the *Losinger* case:

'L'État ne peut se libérer d'obligations contractuelles valables ni par son droit privé interne, ni par ses dispositions légales de droit public. La thèse contraire équivaldrait à rendre aléatoire tous les contrats conclus par les étrangers avec un État, puisque celui-ci aurait toujours la faculté d'anéantir ses engagements en promulguant des lois spéciales, comme il l'a fait en l'espèce. La validité d'une obligation assumée par un État doit évidemment s'apprécier d'après la législation en rigueur au moment où l'obligation est née. Cette règle de simple bon sens ne souffre aucune discussion.'¹

It may well be that this solution may be applied as it stands to some kinds of contract; but as a general statement it would seem itself to require some qualification. It has already been noted that the doctrine of acquired rights itself is subject to exceptions in that it is not every right that is protected.² It can hardly be the case that the proper law of every State contract is, so to speak, frozen into immobility at the moment of the conclusion of the contract. It is not to be expected that the normal development of the proper law of the contract, or, for example, action taken by a State to ensure public safety or public health, even though modifying the contract régime, would necessarily result in an international wrong.³

¹ *P.C.I.J.*, Series C, No. 78, p. 32. This passage is also cited in Mann's article, loc. cit., p. 577, q.v., for a telling criticism of the view here put forward.

² One need go no further than the *Oscar Chinn* case, *P.C.I.J.*, Series A/B, No. 63, for an example.

³ And indeed it must surely be true that in so far as a State might have a right to take necessary action, for example, for the public safety and the like, any right it may have to do this in *prima facie* breach of a State contract would surely exist *whatever* the proper law of the contract. It is, however, a moot question whether even such a right may be exercised without the

It is wrong to suppose that *pacta sunt servanda* must apply *tout court* in all cases or in none. No mature law of contract is absolute, and few principles of law are to be understood without qualification. The undoubted fact that there exist cases where a State is entitled to change a contractual relationship with an alien does not mean that the principle *pacta sunt servanda* is altogether inapplicable to State contracts.¹ Is it not likely that the true position is that the principle functions, as it does in the case of treaties,² as a presumption: a presumption leaning against the existence of any right of unilateral termination; but which, like all presumptions, may in some cases be successfully rebutted? Thus understood it may be found both to fit readily into the pattern of existing law and to explain it.

Neither the principle of acquired rights nor the principle of *pacta sunt servanda* is therefore to be regarded as being necessarily absolute or unconditional in its application. As so often in law it is a question of drawing limits and defining exceptions.³ Whether or not an alleged 'breach' of contract amounts to a breach of international law may depend upon a number of variants such as the circumstances, or even the motives of the State action with respect to the contract; as also on the nature of the contract itself and the terms in which it is drafted. It may well be the case that the solution is changed when there is in the contract an arbitration clause, for example, or an undertaking by the State not to exercise any right of expropriation during the period of the concession. Clearly again the solution may be different where the proper law of the contract is not the municipal law of the contracting State but some other municipal law, or the general principles of law or international law. There is a strong body of authority in favour of the view that certain classes of State contract such as long-term economic development agreements differ by their very nature from other State contracts and are therefore subject in some respects to different rules; and that a contract can for this or that reason be invested as it were with a specifically international character and so be placed upon a different footing from some other State contracts.⁴ To enter further upon these

payment of compensation seeing that nationalization under a right also conferred for the requirements of public utility requires compensation to render it lawful.

¹ Mann, loc. cit., pp. 576-7, puts the case where 'the defendant state's refusal to perform the contract according to its tenor is said to be justified by legislative or executive measures of general impact taken since the conclusion of the contract by the defendant state whose law governs the contract, and which, as such, are not open to attack'. And he gives examples, such as a general law reducing interest rates, revocation of import licences, the introduction of a general law such as a prohibition law making a brewery's business impossible and so on.

This, says Dr. Mann, 'is the crucial case'. But, with great respect, it is not the crucial case but merely the difficult case.

² Cf. McNair, *The Law of Treaties* (2nd ed., 1961), chap. 30.

³ Cf. *Arbitration between Germany and Portugal*, 1919, Award II, *U.N.R.I.A.A.*, vol. 2, p. 1039: 'The law of nations demands respect of private property, but recognizes that the State has the right to depart from that principle when its higher interests so require.'

⁴ See Garcia Amador, loc. cit., at p. 39: 'the first step must be to distinguish between, on the

matters would be to enter upon questions of the interpretation of particular contracts or classes of contract and would be to range outside the field this inquiry is intended to cover; though it may be noted in passing that there is a great wealth of legal material from which the answers to these problems may be fashioned whether by judicial elaboration or otherwise.¹ There is, however, one matter of general principle which calls for some comment.

The propositions that the will or intention of the parties expressed in a State contract can determine the adjective law of the contract as other than the local law, or create an obligation in the State to submit to arbitration, or limit the State's right to expropriate, or give the contract an international character that it might otherwise not possess—all these propositions assume that international law is in any case directly relevant to the legal régime of State contracts. For how can a term of the contract itself affect the legal status of the contract in *international* law unless there is first the possibility in principle of some point of connexion between the contract itself and international law? It is only if this point of connexion with international law already exists that escape out of the State's régime becomes possible as a result of one of these devices. Even the contract where the parties have chosen international law as the proper law of the contract depends, it is submitted, upon the prior validity of this general proposition; for how can the parties choose that international law be the proper law in any sense that is significant within the international law system unless there was first a point of contact with international law whereby this choice of law may become an obligation existing in and effective in international law? If it is said that this result depends merely upon the application of a universally accepted principle of private international law concerning the choice of law of a contract, this is merely to assert that this principle of private international law is also a principle of public international law.

This is not to suggest, of course, that all of these devices for giving this or that international character to a State contract are equally effective. But it is to submit that if *any* one of them is effective, it follows that it has ceased to be possible to assert that the State contract is *per se* something which exists only in the municipal sphere. And if there is any point of direct contact between international law and the State contract, the theory

one hand, contracts and concession agreements which are governed by municipal law and, on the other hand, those modern instruments which are subject to the law of nations or to some legal system other than the local law.' See also Addendum to Sixth Report (A/CN.4/134/Add.1 of 11 December 1961), where it is provided in Art. 10(3): 'If the contract or concession is governed by international law or by legal principles of an international character, the State is responsible for the mere failure to carry out the obligations stipulated in the said contract or concession.' See also comment on p. 23.

¹ See, for example, the fertile suggestions contained in Judge Jessup's *Transnational Law* (1956), *passim*.

that the only remedy for the alien contractor is for a *distinct* tort entirely independent of the contract is no longer tenable.

VIII

Before attempting to draw any conclusions from this brief survey there is another question of general principle that requires some notice: the question of national and international standards. This is not the place to embark upon an examination of a controversy which has debilitated the law of State responsibility for close on a century.¹ Yet something must be said about the relevance of these standards to this problem of the State contract and international law.

Most arguments about these rival systems—the national and international standards—tend to be juristic and conceptual arguments intended to demonstrate that the one or the other system, as the case might be, is the law and the other is not. These arguments have had their place, but it seems doubtful whether they can now take the matter very much further. It is becoming possible now to see the controversy in its historical context and to appreciate how far it has been merely symptomatic of different and opposed interests in the matter of State responsibility. It has often been observed that when States divided on this issue at The Hague Codification Conference in 1930, the result looked very like a division between States that were usually defendants and States that were usually plaintiffs.² Is it not probable that the resultant general international law which develops from this conflict of interests will not be entirely expressible in terms of either theory alone, but will bear the marks of having been influenced by both, though perhaps different in some respects from either? Thus, for example, the acceptance of the primacy of international law over municipal law in this matter is the product of the insistence on an international standard; but the national standard is reflected in the accepted principle of non-discrimination against aliens.³ On the other hand, the development of a law of human rights must mean that the orthodox insistence on the special position of the alien will become obsolete; in which case the very

¹ See Roth, *The Minimum Standard of International Law applied to Aliens* (1949).

² See Briggs, *The Law of Nations* (2nd ed., 1953), p. 564.

³ Nevertheless, the plea of non-discrimination standing *alone* will not suffice as an international standard. As the late Sir Hersch Lauterpacht pointed out, 'The plea of non-discrimination as a defence against a charge of violation of international law amounts, upon analysis, to a claim of the sovereign State to disregard international law and to erect its own law as the sole standard of the legitimacy of its action so long as such action is of general application. That claim the Court has declined to countenance. The attitude of the Court on the subject is fully in accordance with its repeated affirmation, as a matter of course, of the priority of the obligations of international over municipal law.' See *The Development of International Law by the International Court* (1958), p. 314.

basis of the classical controversy about the two standards will have disappeared.

Although it embodies the basic and necessary notion of the primacy of international law, the international standard has in some ways hindered rather than helped the development of an international law governing State contracts. For the idea of the international minimum can lead to a relatively low, not to say crude, measure of conduct. Thus, in the well-known statement of the measure of the standard in the *Neer* case it is said that

'the propriety of governmental acts should be put to the test of international standards, and that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.'¹

The relevance of this kind of standard to claims involving the personal liberty or the life of an alien is at once apparent and understandable. It is this kind of case that State responsibility was at one time principally concerned with. Some of the older writers, indeed, regard this kind of question as the whole content of the subject.

But so crude a standard has little relevance to questions arising from modern commercial contracts and concessions. In many cases of an alleged breach of such a contract an allegation of an 'outrage' on the part of the contracting State is neither likely to succeed nor seemly to be made. It belongs to the stage of pure delict when the role of the law was to sanction the crudest forms of self-help rather than to elaborate principles of law suitable to be applied by a judicial process. What is now required in a spherelike contract is the development not so much of very general principles and standards as of detailed rules of technical law. No doubt these rules may then be said to represent the contemporary content of the international standard as applied to State contracts. But such rules cannot be deduced *a priori* from the idea of an international standard.² They must be hammered out in the practice of Governments and by the familiar process of the development of the law through its application by inter-

¹ *United States v. Mexico*, General Claims Commission, 1926.

² *Certain Norwegian Loans case (France v. Norway)*, I.C.J. Pleadings, vol. 1, p. 484, where the Norwegian *duplique* says: 'il convient de noter que le "standard minimum" ne peut se définir *a priori*'; and then cites an apposite passage from Professor Verdross: 'il faut rechercher *dans chaque cas* le niveau de conduite commun que les états civilisés observent d'ordinaire à l'égard des étrangers' (italics supplied), *Recueil des cours*, 37 (1931—III), p. 353.

It is perhaps also a mistaken notion to set too much store by the method of establishing minimum international standards by comparative researches into selected municipal laws. The inconclusive results of such procedures are well illustrated in the pleadings in the *Norwegian Loans case* (see above).

national tribunals. The international standard thus means little more in practice than the assertion of the primacy of international over municipal law; though this principle is, of course, fundamental. Still the time has probably come to concentrate on the development of specific rules of law for particular situations rather than to hark back to an obsolescent controversy over the most general of principles.

IX

Conclusions

What then is the relevance of rules of public international law to a State contract made in the local municipal law with an alien? It is submitted that the following conclusions may now be drawn.

1. There is nothing in the structure of international law and nothing in the relationship between international law and municipal law that inhibits the recognition of international law remedies which relate directly to the contract. It is precisely because one of the parties is a sovereign State, able by its sovereignty to change the proper law of the contract, that international law is apposite to the situation. It is, to put it in another way, a situation to which the international standard of State conduct must apply.

2. This is not to suggest that international law will supplant the proper law as the system in which the contract has its being; if only because the will of the parties, according to which the municipal law was made the proper law of the contract, must be respected. But the local municipal law, when functioning as the proper law of a State contract, just as in other situations, must conform to any requirements laid down by international law governing the conduct of States. International law is therefore relevant to the contractual situation as an adjectival law.

3. Thus, a termination or alteration of the contract by a change made in the proper law, though it cannot in the nature of things amount to a breach of contract in the proper law, may nevertheless amount to a breach of international law. The claim may be delictual in form but it may still be a remedy in respect of the contract.¹

4. The incursion of international law into this kind of situation is not to be denied merely on the ground that it is at variance with the will of the parties in making the local law the law of the contract, for it is precisely the

¹ See Hyde, *International Law*, p. 991: 'Again, a State may, in the exercise of its power as a sovereign, alter or destroy its contractual obligations and so pursue a course in relation to its undertaking that is not only harmful to the alien party thereto, but also at variance with the theory on which the arrangement was concluded and with what that party had reason to anticipate. Such action, manifestly in one sense a breach of the agreement and affected by it, constitutes also tortious conduct that possesses an internationally illegal quality.'

reasonable expectation and will of at least one of the parties at the time of the making of the contract that is being destroyed by the proper law.

5. This is not to deny that there may be situations where the contracting State is entitled to change the law though the result be to the detriment of the alien contractor. The point is that the definition of these situations must itself be a question of international law.

6. The delictual form of action will be the necessary vehicle so long as the law remains in the stage where the concept of the protecting State is a necessary element in the law. But it is possible now to envisage the development of the law towards a stage where the delictual element will have atrophied and the essentially contractual nature of the remedies will have come to the fore.

7. This part of international law, like so many other branches of the law, is in great need of elaboration. This can best be accomplished by its application to concrete cases by arbitral tribunals. There is a wealth of material from which the law could by this means be developed.

THE USE OF FORCE IN SELF-DEFENCE*

By IAN BROWNLIE, M.A., D.PHIL.

Lecturer in Law in the University of Nottingham

Introduction

THE meaning of the term 'self-defence' has remained the most vital issue relating to the legal regulation of the use of force by States and the purpose of the study presented here is to elucidate its meaning. In the course of the inquiry particular emphasis will be placed on the practice of States and the deliberations of organs of the League of Nations and the United Nations Organization. Furthermore, two considerations dictate that the study be conducted on historical lines. First, a number of writers, and some Governments, present the law in terms of the customary law of the nineteenth century and regard more recent developments as a superstructure to be understood in the context of the classical law. In order to assess the validity of this approach it is obviously necessary to look at the historical evidence. Secondly, the growth of customary rules of international law is usually a gradual phenomenon and may present a process of evolution in which concepts in a substantially new rule can only be understood by referring to an earlier state of things.

At the outset it will be convenient to explain the scope of the inquiry. In the first place this is confined to consideration of the problem of the use of force¹ in self-defence, and questions as to the status in the modern law of other measures by States which have been characterized as self-defence and which do not involve a use of force will not be pursued.² The more significant limit to the discussion, however, is the result of an intention to give a coherent account of the evolution of the concept of self-defence, and it will not be possible to give adequate consideration to the question whether certain specialized rights based on the category of intervention have survived in the modern law. References to the latter category will necessarily occur since the legal categories of self-defence and intervention are closely linked in the relevant materials. The general position of the doctrine of

* © Dr. I. Brownlie, 1962. This article is based upon material contained in a work by the present author to be published shortly by the Clarendon Press under the title *International Law and the Use of Force by States*.

¹ The concepts of 'use of' or 'resort to' force, and of 'force' will receive some consideration subsequently.

² Thus the jamming of radio propaganda may be presented as self-defence against 'indirect aggression' or 'subversion'. Cf. Draft Articles on Diplomatic Intercourse and Immunities, *Report of the International Law Commission*, 10th session, 1958, commentary to Article 27; *American Journal of International Law*, 53 (1959), p. 230 at p. 273.

intervention will no doubt become apparent from the subject-matter, but definitive conclusions as to the legality, for example, of intervention to protect the lives and property of nationals in foreign States, will not be offered.¹

I. JUSTIFICATIONS FOR THE USE OF FORCE IN THE CLASSICAL LAW: CUSTOMARY RULES OF THE NINETEENTH CENTURY

The customary law shows greater complexity than is commonly assumed. The complexity springs in part from the contradiction between the assertion of a sovereign right to resort to war and to gain title by conquest, on the one hand, and a tendency in spite of this to provide theoretical and moral bases for resort to war, on the other. A lack of a coherent terminology contributes to the confusion.

The right of war, as an aspect of sovereignty, which existed in the period before 1914,² was very rarely asserted either by statesmen or works of authority without some stereotyped plea to a right of self-preservation, and of self-defence, or to necessity or protection of vital interests, or merely alleged injury to rights or national honour and dignity.³ Unilateral interference with the *status quo* was regarded as a *casus belli*.⁴ The great variety of *casus belli* admitted in State practice indicates the unreality of any theoretical justification on the ground of a right of self-preservation or on the basis of a doctrine of necessity. Moreover, the essential subjectivity of such concepts was reinforced by the right assumed of individual determination of the factual prerequisites for the resort to war. Nevertheless, much learning was devoted to the right of self-preservation, and in this may be detected a tincture of natural law doctrine. The natural law element appears in the reference to 'inherent rights' and the use of analogies from private law. In *Le Droit des gens* Vattel, speaking of the right to make war, says:⁵

'En traitant du Droit de sûreté, nous avons montré, que la Nature donne aux hommes le droit d'user de force, quand cela est nécessaire, pour leur défense et pour la conservation de leurs droits.'

¹ It must be emphasized that this reservation is based on problems of presentation alone. The writer takes the view that this type of intervention is almost certainly illegal in the modern law but in the compass of this study it is proposed to treat only of the category of self-defence.

² See the references to the opinions of writers classified by von Elbe, *American Journal of International Law*, 33 (1939), p. 684. Conquest gave title: see McNair, *The Law of Treaties* (1938), pp. 390, 397, 400 and 406. In theory and practice the right of war was often presented as a final resort after peaceful means of settlement had failed or been refused: see an opinion of Phillimore, dated 24 November 1865, *Law Officers' Opinions*, 1865, No. 194.

³ See von Elbe, loc. cit., at p. 686.

⁴ Stowell, *Intervention in International Law* (1921), pp. 414 et seq.

⁵ Book III, chap. i. 3.

He refers also to 'les justes bornes, que la Nature a mises à un Droit accordé seulement par nécessité'. His chapter on the just causes of war¹ provides a considerable number of justifications for war including preventive self-defence, the maintenance of rights and the maintenance of the balance of power. In Book II he asserts that States have a *duty* of self-preservation:²

'C'est en vain que la Nature prescrit aux Nations comme aux particuliers le soin de se conserver, celui d'avancer leur propre perfection et celle de leur état, si elle ne leur donne pas le droit de se garantir de tout ce qui peut rendre ce même soin inutile.'

This right of self-preservation is stated in many works on international law which appeared in the nineteenth century. The French edition of Klüber published in 1831³ discusses the right of self-preservation as one of the 'droits absolus des états'. Wheaton⁴ discusses the right at some length and his exposition in effect equates its exercise with *raison d'état*. Indeed, the various authors give a variety of vague interpretations to the right. Some writers derive the right of self-defence and the right of self-preservation from a fundamental right of existence.⁵

The right of self-preservation is in some cases asserted parallel to, or as a form of, a doctrine of necessity. There would seem analytically to be no distinction between the two, and the discussions in works on international law certainly treat them as identical except in so far as necessity is a wider legal category and may, for example, appear in the context of the laws of war.⁶ In many cases necessity thus appears merely as an aspect of the right of self-preservation. When 'necessity' is defined it appears to be applicable when action is necessary for the security or safety of the State.⁷ As the State taking such action was regarded as the judge of the situation, necessity, like self-preservation, usually appears as the window-dressing of *raison d'état*.

¹ Book III, chap. iii.

² Book II, chap. iv. 49. See also Book I, chap. ii. 14, 16, seq. and Book II, chap. v, para. 65 seq. For Vattel the law of nature which affected the conscience of sovereigns was concerned with the justice of wars, the positive law was not.

³ *Le Droit des gens* (1831), vol. 1, paras. 36-44.

⁴ *Elements of International Law* (1866), Part II, chap. i, para. 61 (No. 19 of *The Classics of International Law* (1936)). The work was first published in 1836. See also Phillimore, *Commentaries*, (3rd ed., 1879), vol. 1, pp. 312-21; Heffter, *Le Droit international de l'Europe* (4th Fr. ed., by Geffcken, 1883), para. 30; Rivier, *Principes du droit des gens* (1896), vol. 1, para. 20; Woolsey, *Introduction to International Law* (5th ed.), p. 184.

⁵ Cf. Fenwick, *International Law* (2nd ed., 1934), p. 146; Sibert, *Traité* (1951), vol. 1, pp. 230 et seq.

⁶ See Oppenheim, *International Law* (8th ed.), vol. 1, p. 298; Stowell, op. cit., pp. 392-414; Rivier, op. cit. See also the treatment in Anzilotti, *Cours de droit international*, vol. 1, pp. 507-15; Kohler, *Not kennt kein Gebot* (1915); Strupp, *Das völkerrechtliche Delikt* (1920), pp. 121 et seq. These writers regard necessity as a justification.

⁷ Rivier, op. cit.; de Martens, *Précis du droit des gens* (1864), vol. 1, paras. 74, 78. See also Weiden, *Transactions of the Grotius Society*, 24 (1938), p. 105; and Rodick, *The Doctrine of Necessity in International Law* (1928).

Even during the nineteenth century there were some attempts to restrict the right to go to war to cases of direct and immediate danger. The Caroline incident on the night of 29–30 December 1837 was the subject of a letter dated 6 February 1838 from the British Ambassador in Washington, Fox, to the American Secretary of State, Forsyth, in which Fox justified the British action:¹

'The piratical character of the steamboat "Caroline" and the necessity of self-defence and self-preservation, under which Her Majesty's subjects acted in destroying that vessel, would seem to be sufficiently established.'

Reports of the Law Officers, dated 21 February 1838 and 25 March 1839, regarded the action as justifiable on this ground.² In a letter of 24 April 1841 from Secretary of State Webster to Fox, later incorporated in a Note to Lord Ashburton of 27 July 1842,³ Webster required the British Government to show the existence of

'... necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorised them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.'

Lord Ashburton, in his letter of 28 July 1842,⁴ did not dispute Webster's statement of principle. The formula used by Webster has proved valuable in recent years, but the correspondence made no difference to the legal doctrine, such as it was, of the time. Self-defence was regarded either as synonymous with self-preservation or as a particular instance of it.⁵ Webster's Note was an attempt to describe its limits in relation to the particular facts of the incident. The statesmen of the period used self-preservation, self-defence, necessity and necessity of self-defence as more or less interchangeable terms, and the diplomatic correspondence was not intended to restrict the right of self-preservation, which was in fact reaffirmed. Many works on international law both before and after the *Caroline* case regarded self-defence as an instance of self-preservation and subsequently discussed the *Caroline* under that rubric.⁶

¹ See Jennings, *American Journal of International Law*, 32 (1938), p. 82 at p. 85. On the incident generally see also Moore, *Digest*, vol. 2, pp. 409 et seq., and vol. 7, pp. 919 et seq.; McNair, *International Law Opinions*, vol. 2, pp. 221 et seq.; Curtis, *The Case of the Virginus Considered with Reference to the Law of Self-defence* (New York, 1874); Bowett, *Self-defence in International Law*, pp. 58–60.

² Jennings, loc. cit., pp. 87, 88.

³ Ibid., p. 89; *British and Foreign State Papers*, vol. 30, p. 193.

⁴ Jennings, loc. cit., pp. 89–91; *British and Foreign State Papers*, vol. 30, p. 195.

⁵ Jennings, loc. cit., pp. 91–92.

⁶ Heffter, op. cit.; Wheaton, op. cit., para. 62; Phillimore, *Commentaries* (3rd ed.), vol. 1, pp. 312–21; Halleck, *International Law* (1861), p. 91; Twiss, *The Law of Nations* (1861), pp. 12–13; Hall, *International Law* (1880), pp. 226–39; Fiore, *Nouveau droit international public* (2nd

It is also necessary to remark that the protection of vital interests as a reserved sphere of competence on the part of a State can be regarded as yet another form of the plea of necessity or self-preservation.¹

The practice of States in relation to intervention

Intervention is a term often applied to any interference in the internal affairs of a State even if the interference takes the form of diplomatic protest or official comment. The present inquiry will be restricted to the narrow sense of the term, that of dictatorial interference. Lawrence² stated that: 'The essence of intervention is force, or the threat of force, in case the dictates of the intervening power are disregarded. . . .'

The term and the use made of it by Governments and writers have been a very considerable source of confusion. It is commonly used to describe any use or threat of force which is considered to be justifiable whether or not the intervention creates a state of war in the formal sense. So employed, it covers cases where there is a specific treaty right to intervene and cases in which some form of collective intervention could be justified. With these exceptions it is yet another descriptive label for the numerous instances in which the use of force was justified on the grounds of self-preservation and self-defence. Thus some works discuss self-preservation and necessity without mentioning a separate category of 'intervention'.³ In other works and in monographs on intervention there is an untidy enumeration of grounds of intervention which overlaps the customary law developing on hostile measures short of war, and does not reserve the term 'intervention' for cases in which no formal state of war is created.⁴ It is in the period after 1840 that the category 'intervention' is employed with such abandon by the writers, presumably as a result of increasing appearance of the term in

ed., 1885), vol. 1, paras. 452 et seq.; Westlake, *International Law* (1904), vol. 1, pp. 296-304; Oppenheim, op. cit. (1905), pp. 177-81; Westlake, *Collected Papers* (1914), pp. 111-30; Baty, *The Canons of International Law* (1930), pp. 37-112; Fenwick, op. cit., p. 146; Ross, *Textbook of International Law* (1947), pp. 247-49. Cf. *British Documents on the Origins of the War, 1898-1914*, vol. 11, pp. 129-30. There is a tendency for more modern writers to discuss the incident under the rubric of 'legitimate defence': see Basdevant, *Recueil des cours*, 58 (1936-IV), pp. 541-2; de Visser, *Bibliotheca Visseriana*, vol. 2, pp. 108-9; Brierly, *Recueil des cours*, 58 (1936-IV), p. 128.

¹ Cf. Brierly, this *Year Book*, 5 (1924), pp. 4, 6-7, 10; Castlereagh, Circular of 19 January 1821; Stowell, op. cit., pp. 333 and 336.

² *Principles of International Law* (5th ed., 1913), p. 124. See also Winfield, this *Year Book*, 3 (1922-3), at p. 140; Hershey, *Essentials of International Law* (1935), p. 236; Brierly, *Law of Nations* (5th ed., 1955), p. 308; Ross, op. cit., p. 185; Kelsen, *Principles of International Law* (1952), p. 64; Oppenheim, op. cit. (8th ed.), vol. 1, p. 305.

³ See Vattel, loc. cit., above; Klüber, loc. cit., above; Wheaton, loc. cit. above.

⁴ Hall, *International Law* (8th ed.), p. 337; Moore, *Digest*, vol. 6, paras. 897 et seq. See bibliographies in Oppenheim, op. cit., p. 304; Stowell, op. cit., p. 461. See also Cavaglieri, *L'intervento nella sua definizione giuridica* (1913); id., *Nuovi studi sull'intervento* (1928); Ann Van Wynen Thomas and A. J. Thomas, *Non-Intervention, The Law and its Import in the Americas* (1956); Rolin, *Le Droit moderne de la guerre* (1920), vol. 1, pp. 148-66; Hettlage, *Niemeyers Zeitschrift für internationales Recht*, 37 (1927), pp. 11-88; Wachter, *Die völkerrechtliche Intervention* (1911).

State practice. The uncertainty attending the customary rules limiting resort to measures short of war made confusion between the practice on such measures and the excuses given by States for the use of force in the form of a 'war' inevitable. By the last quarter of the nineteenth century intervention had become a synonym for use of force which might or might not be justified by international law. In discussing the justifications writers frequently adopted the various grounds which had formed the content of the right of self-preservation.¹ The term 'intervention' was felicitous in that it covered humanitarian and collective intervention, forms of action which did not easily yield to classification either as self-preservation or under the doctrine of necessity.

Hostile measures short of war

By perhaps the year 1880 it had become recognized in the practice of States that certain legal conditions were to be observed if resort to force was not to be regarded as creating a formal war and the application of the rights and duties of belligerency and neutrality.² Reprisals, pacific blockade and various types of intervention appeared as institutions of customary law. These institutions will receive further notice in the pages that follow. In theory they created a legal régime for the use of force which did not involve a state of war, and modern writers refer to them as though they were highly formalized and well defined. The position was in practice affected by the artificiality of the state-of-war doctrine, and both writers and Governments failed to provide any adequate means of distinguishing between the various 'hostile measures short of war', or between these, the right of self-preservation and self-defence, and the category of 'intervention'.

Thus the hostilities against the 'Boxers' and Chinese troops in 1900 and 1901 were variously categorized by contemporary statesmen, diplomats and Governments *inter alia*, as 'war', 'intervention', and an 'expedition'.³ The practice of States was in this case concerned with the question as to whether a state of war existed. Writers have nevertheless been intrepid in forcing these events into the legal mould of 'hostile measures short of war,'⁴ or in

¹ See Stowell, *op. cit.*; Oppenheim, *op. cit.*, pp. 305 et seq.; Flockher, *Revue générale de droit international public*, 3 (1896), p. 239; *id.*, *De l'intervention en droit international* (Paris, 1896), (on which, Stowell, *op. cit.*, p. 487); Kebedgy, *De l'intervention* (Paris, 1890) (Stowell, p. 503); Rotteck, *Das Recht der Einmischung . . .* (1845) (Stowell, p. 525); Hall, *op. cit.*, pp. 337 et seq.; Moore, *Digest*, vol. 6, para. 897.

² It is not possible to consider the development, and the implications, of the legal concept of war in the present article. Reference may be made to Oppenheim, *op. cit.* (7th ed.), vol. 2, p. 201; Grob, *The Relativity of War and Peace* (1949); and Kotsch, *The Concept of War in Contemporary History and International Law* (1956).

³ See Grob, *op. cit.*, pp. 64-79; Moore, *Digest*, vol. 5, pp. 476-533.

⁴ Hyde, *International Law* (2nd rev. ed.), vol. 1, p. 647 (protection of persons and property of aliens).

classifying the action as a joint punitive expedition,¹ or acts of self-preservation.² The United States occupation of Cuba in 1898 was not related to the distinctions drawn by the writers, and the writers themselves failed to agree on its correct characterization. The Joint Resolution of Congress approved on 20 April 1898 justified the intervention in terms of American interests.³ Writers have, nevertheless, described it as a case of humanitarian intervention,⁴ intervention to protect the property of nationals,⁵ action dictated by a variety of motives,⁶ or abatement of a nuisance.⁷ It is equally artificial to describe the landing of United States forces at Vera Cruz in 1914 as a reprisal or as intervention to protect American lives and property.⁸

*Some conclusions on the state of the
customary law as it had developed by 1914*

It is considered that the only justifiable conclusion to be drawn from the State practice and the discussion found in the literature of the law is that the categories 'self-preservation', 'self-defence', 'intervention' and 'necessity' have very similar content in relation to the justification of the use of force. This proposition can be elaborated as follows:

1. The right of self-preservation is regarded as identical with that of self-defence.

Qualification. Some writers treat the latter as an aspect or subdivision of the former.⁹ A few regard self-defence as the application of the right of self-preservation in case of attack or apprehended attack.¹⁰

2. The justified use of force in exercise of the right of self-preservation is identical with the operation of the doctrine of necessity.

Qualification. Some writers treat necessity as an aspect or subdivision of the right of self-preservation.¹¹ The legal category of necessity is in fact wider than the context of justifications for resort to force, and it appears in other contexts, e.g. military necessity in the law of war and the right of angary.

3. The occasions for lawful intervention are identical with the justification provided by the right of self-preservation and the doctrine of necessity.

¹ Hall, *op. cit.*, p. 66.

² *Ibid.*, p. 339.

³ Stowell, *op. cit.*, p. 122. See also Hyde, *op. cit.*, p. 259, Special Message of President McKinley, 11 April 1898. Generally: Falck, *Diplomatic Relations Preceding the War of 1898* (1906); Benton, *International Law and Diplomacy of the Spanish-American War* (1908).

⁴ *Ibid.*, pp. 57, 120, 481.

⁵ Cf. Bowett, *Self-defence in International Law*, p. 97.

⁶ Woolsey, *America's Foreign Policy* (1898), pp. 64-65, quoted by Stowell, p. 122.

⁷ Moore, *Principles of American Diplomacy* (1918), p. 208.

⁸ See Grob, *op. cit.*, pp. 94-95; Hyde, *op. cit.*, vol. 2, pp. 1664-6; Hackworth, *Digest*, vol. 1, pp. 151-2 and vol. 2, pp. 420-21; Offutt, *The Protection of Citizens Abroad by the Armed Forces of the United States* (1928), pp. 118-23; and the *American Journal of International Law*, 8 (1914), p. 579.

⁹ Above, p. 186, n. 6.

¹⁰ Westlake, *International Law* (1904), vol. 1, p. 299. He defines attack widely, however.

¹¹ e.g. Oppenheim, *op. cit.*, p. 298; Anzilotti, *Cours de droit international*, vol. 1, pp. 511-14.

Qualification. Intervention is applied to justified use of force in situations other than those justifying exercise of the right of self-preservation; in particular intervention in virtue of treaty rights, humanitarian and collective intervention.

Intervention is sometimes employed by both Governments and writers¹ to describe action not intended to create a state of war.

4. There is no clear distinction between exercise of a right to go to war in exercise of the right of self-preservation and its other forms, on the one hand, and 'hostile measures short of war', on the other. In particular the category 'intervention' usually extends over the whole field.

5. The variety of ways in which Governments and writers characterize and classify the various occasions when force has been used indicates the *ex post facto* and illogical nature of their classifications. Writers have failed to give a logical exposition of the customary law because they have assumed an orderly use of categories which were not generally accepted in State practice and because they refused to admit the hopeless confusion of terminology present in State practice and the legal literature.²

6. The confusion is traceable to a dislike of Governments for open reliance on an arbitrary right to resort to war. As a result there was a practice of relying on vaguely defined grounds justifying the use of force. These excuses were formulated in broad terms of self-preservation, security and necessity, and as the State resorting to force was its own judge in the matter it mattered little whether the justifications were regarded as legal or moral. Nevertheless, the pleas appeared frequently in State practice, and the writers had the unhappy task of rationalizing them.

Analytically, the customary right of self-preservation and the doctrine of necessity, together with the various glosses on these, comprehend two situations:

- I. Action to enforce legal rights. This in theory would restrict the use of force to cases in which pacific settlement had failed.
- II. A much wider freedom of action when 'security' is threatened, or the *status quo* is disturbed: it is in this latter situation that the law ceases to have any limiting effect.

The first of these situations is compatible with the existence of a legal order provided that recourse is had to available means of pacific settlement and there are reasonably adequate and certain criteria for a decision that

¹ See Hall, *op. cit.* (5th ed.), p. 284, quoted in Moore, *Digest*, vol. 6, p. 2; Oppenheim, *op. cit.* (7th ed.), vol. 2, p. 299.

² It is to be readily admitted that today legal apologia by States are frequently *ex post facto* and that Governments do not use legal categories with consistency. However, regarded as a question of degree, nineteenth-century practice showed particular confusion. Cf. Lingelbach, *Annals of the American Academy of Political Science*, 16 (1900), p. 1: 'The relation of intervention to international law and even the rules governing the practice are still in an extremely unsettled state.'

legal rights have been infringed. The second situation is incompatible with the existence of a viable legal order unless the right of self-preservation is given a narrow definition and the use of force in the exercise of that right is subject to subsequent legal evaluation by international organs or other States. The practice and doctrine of the period before 1920 present both a right of self-help and a right of self-preservation, the latter being unfortunately predominant and therefore obscuring the juridical value of a doctrine of self-help. This latter doctrine, which regarded war as a mode of judicial settlement, was nevertheless gaining ground in the period before the First World War. The greatest obstacle to adequate legal regulation of the use of force was the right of self-preservation and the related tangle of doctrine concerning necessity and intervention. Categories such as self-preservation and necessity are too vague and susceptible to selfish interpretation to provide a sufficient basis for a legal régime. They might be usable in a system in which every situation was the subject of judicial assessment, but even in a municipal system these categories are but explanations of particular legal rules in particular contexts. The 'doctrine of necessity' is a logical and legal absurdity.¹ 'Necessity' may denote the original ground for what is now exercise of a legally protected right, a description of a particular privilege or excusable act, or reference to the degree of danger which makes action justifiable.² This latter function it cannot perform very efficiently since 'necessity' is a term of considerable relativity. Lastly, the attempt to use vague categories of intervention and self-preservation to give a veneer of legality and morality to the exercise of the right of war or to the numerous interventions which occurred in this period obscured the situation and complicated the task of creating an adequate legal régime for the use of force.

II. THE MAJOR DEVELOPMENTS IN THE LAW IN THE PERIOD 1920-45

The significance of the changes which occurred in this period calls for some notice, although numerous accounts of the legal changes are already

¹ Some nineteenth-century writers criticized, or denied the existence of, such a doctrine. See Weiden, *Transactions of the Grotius Society*, 24 (1938), p. 105 at pp. 117, 131. See also Sibert, *Traité* (1951), vol. 1, p. 236; de Visscher, *Bibliotheca Visseriana*, vol. 11, p. 111; id., *Revue générale de droit international public*, 24 (1917), p. 74; id., *La Belgique et les juristes allemands* (1916), p. 16, and in *Belgium's Case, A Juridical Enquiry*, pp. 18-57; Sturzo, *The International Community and the Right to War* (1929), p. 134; Stowell, op. cit., pp. 392-405; Strisower, *Der Krieg und die Völkerrechtsordnung* (1919); Borsi, *Rivista di diritto internazionale*, 10 (1916), pp. 157 et seq.; Cybichowski, *Studien zum internationalen Recht* (1912), pp. 21 et seq.

² Compare the variety of situations considered under the rubric 'necessity' in works on the law of tort in common law jurisdictions.

available,¹ as the major features must provide the necessary background to a study of particular justifications for the use of force permitted by the law. Moreover, as a period of transition, linking the customary law of the nineteenth century and the era of the United Nations, it has peculiar interest and an evaluation of the provisions of the United Nations Charter will depend in part on the developments before 1945.

The period is dominated by the signing of the General Treaty for the Renunciation of War on 27 August 1928,² to which sixty-three States became parties. Before the General Treaty prohibitions of resort to force were generally regarded as limited to the extent of the prohibitions set out in the Covenant of the League of Nations.³ The General Treaty went much further than the Covenant and was drafted in terms which emphasized the prohibition. The signatories renounced war 'as an instrument of national policy in their relations with one another'. It is not proposed to consider here the great variety of legal problems relating to the General Treaty, but three questions will be treated with varying degrees of amplitude. Two of these refer to aspects of the Treaty which have been regarded by writers as particular sources of weakness. First, reservations of the right of self-defence were made and the effect of these reservations will be considered subsequently. Secondly, the General Treaty refers to 'war' in Article I and to 'peaceful means' in Article II, and it was suggested by some writers that the formalism of the concept of war which had developed in the nineteenth century could be imported into the Treaty. In other words, on this interpretation it failed to prohibit hostile measures short of war.⁴ The *travaux préparatoires* indicate that the sponsors were unaware of the problem. It is impossible to be dogmatic on the matter, but it is submitted that the General Treaty was intended to prohibit any substantial use of force.⁵ This submission can be supported by two considerations. The first is that the principle of effectiveness in the interpretation of treaties would seem to be the proper one to apply to the Treaty in view of the wide expression

¹ See the bibliography and references in Oppenheim, *op. cit.* (7th ed.), vol. 2, pp. 177-97.

² *United Kingdom Treaty Series*, No. 29 (1929), Cmd. 3410; *League of Nations Treaty Series*, vol. 94, p. 57; Hudson, *International Legislation*, vol. 4, p. 2522. Bibliographies: Sohn, *Cases on World Law*, p. 791; Oppenheim, *op. cit.*, p. 177; Hudson, *loc. cit.*

³ Thus the resolution of the Eighth Assembly of the League of Nations adopted on 24 September 1927, which declared that 'all wars of aggression are, and shall always be, prohibited', was assumed to be limited in this way. See Wehberg, *The Outlawry of War* (1931), pp. 42-46 and Barandon, *Le Système juridique de la Société des Nations pour la prévention de la guerre* (1933), pp. 12, 271-4. In any case a number of writers considered that the resolution did not create legal obligations.

⁴ See Gonsiorowski, *American Political Science Review*, 30 (1936), p. 676, and the writers referred to therein; and also Oppenheim, *op. cit.* (7th ed.); vol. 2, pp. 184-6.

⁵ In Oppenheim, *op. cit.*, at p. 186, after reference to instances of resort to force which did not result in actual hostilities, or a formal finding of an international organ that the General Treaty had been violated, or a formal state of war, the text states that 'there ought to be no doubt that the obligations of the Pact were disregarded in all these cases'. See also Hsu Mo, *Transactions of the Grotius Society*, 35 (1949), p. 8, and McNair, this *Year Book*, 17 (1936), p. 157.

given to its objects in the preamble and the forceful terms of the text itself. A second, and more cogent, consideration is the meaning accorded to the instrument in the subsequent practice of States.¹ The subsequent practice of parties to the General Treaty leaves little room for doubt that it was understood to prohibit any substantial use of armed force. Thus the Soviet Union and China did not seek to justify their action by pointing to the absence of a conflict between them in 1929.² The reaction of members and organs of the League of Nations to the Sino-Japanese conflicts which broke out in 1931 and 1937 is also of significance in this respect since neither side admitted that war existed, yet numerous characterizations of Japanese actions in terms of the General Treaty occurred.³ The third matter which calls for notice is the extent to which the practice of States between 1928 and 1945 confirmed and supported the obligations contained in the General Treaty. In the diplomatic papers of the decade after its conclusion references to its obligations were numerous and regular.⁴ Numerous non-aggression pacts were concluded which were intended to affirm the obligations of the General Treaty⁵ and many multilateral instruments contained references to it.⁶

Some brief notice may also be accorded to instruments other than the General Treaty which played a leading role in regulating the use of force. Thirty-two States of America and Europe became parties to the Anti-War Treaty of Non-Aggression and Conciliation signed at Rio de Janeiro on 10 October 1933.⁷ By Article I of the Treaty the parties declared 'that they condemn wars of aggression in their mutual relations and in those with

¹ This form of aid may be described either as a principle of interpretation or as a rule of evidence and it raises the issue of estoppel. See Fitzmaurice, this *Year Book*, 28 (1951), pp. 9, 20-21, and 33 (1957), pp. 223-5.

² *Documents on International Affairs* (1929), pp. 274 et seq.; Degras, *Soviet Documents on Foreign Policy*, vol. 2, p. 406.

³ With reference to the events of 1931 see Willoughby, *The Sino-Japanese Controversy and the League of Nations* (1935), pp. 59, 73, 75, 82-84, 89, 107, 109, 110, 120, 137, 150, 157, 183-7, 239-40, 286-9, 377. See further the Report of the Advisory Far Eastern Committee approved by the League Assembly by resolution of 6 October 1937, *League of Nations Official Journal*, Spec. Suppl., No. 169, p. 148; *Documents on International Affairs* (1937), p. 697.

⁴ The following examples may be cited: the statement of the Chinese National Government, 18 January 1938, *United States Foreign Relations* (1938), vol. 3, p. 35; memorandum by the British Permanent Under-Secretary for Foreign Affairs, 14 February 1938, *ibid.*, p. 89; statement by the Soviet Commissar for Foreign Affairs, 17 March 1938, *Documents on International Affairs* (1938), vol. 1, p. 314; and a statement by the Czechoslovak Minister in Washington, 1 October 1938, *United States Foreign Relations* (1938), vol. 1, p. 710.

⁵ E.g., the Treaty of Friendship, Non-Aggression, Arbitration and Conciliation between Roumania and Turkey, signed on 17 October 1933; *Politische Verträge* (1936), vol. 1, No. 138; Treaty of Non-Aggression between China and the U.S.S.R., signed on 21 August 1937, *Politische Verträge (Erster Halbband)*, vol. 3, p. 757.

⁶ E.g., Pact of Organization of the Little Entente, signed 16 February 1933, Hudson, *International Legislation*, vol. 6, No. 1325; Inter-American Convention to Co-ordinate Existing Treaties, signed on 23 December 1936; *ibid.*, vol. 7, No. 491.

⁷ *Ibid.*, vol. 6, No. 346. The Treaty was replaced by the Bogota Charter when this entered into force: see Article 58 of the Bogota Charter, *United Nations Treaty Series*, vol. 30, No. 449.

other States, and that the settlement of disputes or controversies of any kind that may arise among them shall be effected only by the pacific means which have the sanction of international law'. Among the various instruments produced by inter-American conferences the most significant in many ways is the Additional Protocol relative to Non-Intervention signed on 23 December 1936 during the Inter-American Conference for the Maintenance of Peace at Buenos Aires.¹ Article I of the Protocol provided that the parties 'declare inadmissible the intervention of any one of them, directly or indirectly, and for whatever reason, in the internal or external affairs of any other of the Parties'. The important circumstance was the absence of any American reservation of the kind entered to Article 8 of the Convention on the Rights and Duties of States signed at Montevideo on 26 December 1933.² In view of previous American policies the clear undertaking of 1936 was of considerable importance.

Although it has not been possible to present the evidence *in extenso*, it is submitted that the practice of States between 1928 and 1945 provides adequate evidence of a customary rule that the use of force as an instrument of national policy was, with certain exceptions, illegal. The violation of the law by a minority of States in 1938 and the years that followed cannot affect the viability of the norm of illegality. Moreover, the nature of the anti-Axis coalition, which developed into the United Nations, was that of belligerents pursuing a war of collective defence in the face of unlawful invasions on a large scale.³ The power and significance of the customary rule were increased by the appearance of the Charter and Judgment of the International Military Tribunal at Nuremberg in 1945⁴ and the affirmation by a resolution of the United Nations General Assembly of 11 December 1946⁵ of 'the principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal'.

The legal developments of the period between 1920 and 1945 and more

¹ Hudson, *op. cit.*, vol. 6, No. 361a.

² *Ibid.*, No. 361. Article 8 provided: 'No state has the right to intervene in the internal or external affairs of another.' This text represented an advance since the United States had successfully opposed a resolution in these terms at the Havana Conference in 1928: see Whitton, *Revue générale de droit international*, 36 (1929), 24. However, the American reservation to the Convention of 1933 was in vague terms, was limited to the Roosevelt Administration and referred to doctrines embodied 'in the law of nations as generally recognized and accepted'. As a result it did not satisfy some jurists, e.g. Yepes, *Recueil des cours*, 47 (1934—I), pp. 81–86.

³ See the terms of the United Nations Declaration of 1 January 1942; *American Journal of International Law*, 36 (1942), 191. By 1 March 1945 forty-seven States had adhered to the Declaration: Goodrich and Carroll, *Documents on American Foreign Relations*, vol. 7, pp. 288–301, 344–5.

⁴ Cmd. 6964.

⁵ *Resolutions of the General Assembly during the Second Part of the First Session, 1946*, Resolution No. 95, p. 188; *History of the United Nations War Crimes Commission*, H.M.S.O. (1948), pp. 187, 259–60. It was adopted unanimously. By resolution 177 (II) of 21 November 1947 the Assembly directed the International Law Commission to formulate the principles referred to and to prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the Nuremberg principles.

especially the legal régime of the United Nations Charter¹ have, it is submitted, created a strong presumption of illegality whenever force is used as an instrument of national policy. Even when a State acts in self-defence, i.e. pursues a lawful object of policy, the burden of proving the legality of the resort to force rests on the State asserting the necessity of self-defence. The instruments referred to above frequently contained, or were otherwise subject to, reservations as to the conditions in which the use of force was justified, or were understood by signatories and adherents to be qualified, in some particulars, by the customary law. Since the fundamental proposition of law is the illegality, and in some cases criminality, of the use of force by States, it is more appropriate to consider the nature of the justifications which still exist or are alleged to exist, these being considered as exceptional and not permissive.² The terms of the basic instruments relating to the use of force, the high power of the norm of illegality, which is no longer concerned with the subjective delictual aspect of force but with its danger to international peace and security, and the progressive narrowing of the sphere of permitted force, justifies an approach which assumes a stern prohibition and discusses exceptions to this general prohibition. This procedure is more in keeping with the sources and gives more precise results *de lege lata* than attempts to work from the concept and theory of aggression. The latter have a useful function but are based on a *a priori* reasoning which does not always reflect the sources, tends to weaken existing norms by subjecting them to theoretical rather than legal analysis, and obscure the existence of a presumption of illegality by discussing the breadth of the illegality and not the exceptional grounds justifying resort to force. In so far as there is a *legal* significance in the distinction between the two approaches it is not entirely correct to say that aggression and justifications for resort to force are the obverse and reverse of the same coin.

III. PROBLEMS OF TRANSITION: THE LEGAL RÉGIME IN THE PERIOD

1920-30

The vague and interrelated legal categories of the customary law of the period prior to 1920 were to create difficult problems when, in the modern period, it was necessary to decide how far the old doctrines had been modified or rendered obsolete. Jurists were to discuss whether developments like the General Treaty for the Renunciation of War had impliedly cancelled doctrines which some regarded as vigorous parts of the customary law and others as phantoms. Furthermore, certain jurists have tended to fossilize the 'classical law' of the nineteenth century as *the* customary law and regard

¹ The relevant features of the Charter will be examined subsequently.

² Cf. Rambert, *Le Droit de la guerre et le Pacte Briand-Kellogg* (1931), p. 39.

those who suggest modifications in that position by treaty or otherwise as having to satisfy a high standard of proof. It is submitted that if the chaotic state of the customary law of the nineteenth century is appreciated it becomes less possible to assume that instruments like the General Treaty and the Charter of the United Nations are qualified by nebulous doctrines derived from a period in which international life was ordered in ways now obsolete.

In the early years of the League of Nations and before the impact of the General Treaty had been felt, the doctrines of the nineteenth century still exercised considerable influence and were to cause not a little confusion.

The Covenant of the League made the basic assumption that resort to war was a mode of self-help and execution where there was no other means of enforcing legal rights. Its provisions were intended to prevent war by providing means of peaceful settlement of disputes, and the League sponsored projects for the extension of obligations of peaceful settlement. Article 15 permitted war when modes of peaceful settlement had failed, and the correct interpretation of Article 10 was probably that it was qualified by Article 15. The gravest problem to be solved in the period of the League was that of restricting self-help while at the same time leaving States with the right to preserve the most essential aspects of existence in a society which lacked an adequate system of policing and community protection. The Covenant assumed that self-help was lawful provided the obligations as to settlement procedures had been observed.¹ One of the 'gaps' in the provisions of Article 15 was the ultimate freedom of a State to use force to effect a settlement. However, paragraph 7 of that article was not relied upon by any State which attempted to justify a resort to force in the lifetime of the League.² Treaties making reference to force permitted under the Covenant ignored this aspect of the Covenant,³ and the General Treaty for the Renunciation of War eventually prohibited war as a mode of settlement. In spite of the practice of States in the matter, works of authority and jurists continued, at least until 1929, to consider war as a means of settlement, and in many cases to repeat the doctrine on the right of self-preservation and necessity.⁴ This treatment of the subject was justified to

¹ Article 10 of the Covenant provided cogent evidence that a bold right of conquest no longer existed. Indeed, Latin-American doctrine in the nineteenth century had condemned conquest. However, in practice there might be no very clear distinction between conquest and resort to war as the ultimate means of settling territorial disputes.

² Cf. Brierly, *Agenda* (Oxford) (November, 1943), vol. 2, p. 291; and in *The Basis of Obligation in International Law*, p. 283.

³ Some treaties provided for mutual assistance in case of unprovoked attack following failure of the procedures for peaceful settlement provided for in Article 15. See below, p. 200.

⁴ Rolin, *Le Droit moderne de la guerre* (1920), vol. 1, pp. 53-54, 133; Strisower, *Der Krieg und die Völkerrechtsordnung* (1919), p. 85; Hall, *International Law* (8th ed., 1924), pp. 81-82; Lawrence, *Principles of International Law* (1930), pp. 87-112; Strupp, *Das völkerrechtliche Delikt* (1920), pp. 122 et seq.; Verdross, *Recueil des cours*, 30 (1929—V), pp. 372, 479 et seq.; Cavaglieri,

a considerable extent since the Covenant merely contained limited obligations of peaceful settlement, the obligation to enforce sanctions had been interpreted almost out of existence and, before about 1929, there was no very great accumulation of State practice, independent of the Covenant, restricting war as a mode of settlement. Between the appearance of the General Treaty and the outbreak of war in 1939 a vast body of State practice had, as has been submitted previously, created customary rules restricting resort to force which negated the assumptions of those who drafted the League Covenant. Prior to the developments of that decade it was still possible to treat the Covenant as special law which did not affect the customary rules developed before 1914.

Also the status of reprisals and their congener, pacific blockade, remained unsettled prior to the General Treaty for the Renunciation of War since the League Covenant employed the term 'resort to war' and the state-of-war doctrine might be held to apply to its provisions. Moreover, even the wide terms of the General Treaty did not finally determine the matter in the view of some writers, although it has been suggested above that a proper interpretation of the General Treaty would bring hostile measures short of war within its prohibition. In any case, treaties of the period tended to employ other terms of art such as attack or aggression. However, the question of reprisals will not be pursued further in view of the facts that the category remained analytically separate from that of self-defence and that the provisions of Article 2, paragraph 4, of the United Nations Charter have finally prohibited reprisals involving the use of force.¹

*Stock justifications appearing in treaties in the
period 1920-30*

The treaties concluded in the period of transition contain certain stock exceptions to obligations of non-recourse to force and, as will be seen subsequently, with the exception of the concept of provocation, the exceptions found in treaties of the period foreshadow later developments in general international law. The State practice of the period after 1920

ibid., 26 (1929—I), pp. 316, 554 et seq.; Seferiades, *ibid.*, 34 (1930—IV), pp. 388 et seq.; De Lapradelle, *Les Principes généraux du droit international* (1930), 12^e leçon, pp. 21-22; Earl of Birkenhead, *International Law* (6th ed., 1927), p. 187; Fenwick, *International Law* (1924), pp. 383-5, 428-9; Von Liszt, *Das Völkerrecht* (12th ed., 1925), p. 446; Fauchille-Bonfils, *Traité de droit international public* (8th ed., 1921), vol. 2, p. 7; Strupp, *Éléments de droit international public* (1927), p. 332; Hold-Ferneck, *Lehrbuch des Völkerrechts* (1930), review, *this Year Book*, 12 (1931), p. 200; Enriques, *Rivista di diritto internazionale*, 20 (1928), pp. 27-49, 149-73.

¹ This is the generally accepted view. See, among many, Oppenheim, *op. cit.* (7th ed.), vol. 2, pp. 143, 152-3; Waldock, *Recueil des cours*, 81 (1952—II), p. 493; Hsu Mo, *Transactions of the Grotius Society*, 35 (1949), p. 8; and Brierly, *The Law of Nations* (5th ed.), pp. 324-5. See also statement of the British Foreign Office on Israeli action directed against Jordan, *The Times*, 27 September 1956.

demands close attention because evaluation and interpretation of the General Treaty and other instruments of the period 1920–39 depends to some extent on the meaning of the phrase ‘legitimate defence’ at the time they came into effect.

The State practice of the period 1920–30, chiefly in the form of treaties, considered force to be lawful in five situations:¹

- (a) treaty creating a *casus belli* in advance;
- (b) use of force as a consequence of ‘provocation’;
- (c) action taken by virtue of Article 16 of the Covenant;
- (d) action in collective defence;
- (e) force justified by the right of legitimate defence.

(a) *Treaty provisions*

The most important example of a treaty provision creating a *casus belli* which might not exist independently of the special provision is to be found in the Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain and Italy signed at Locarno on 16 October 1925.² Paragraph 3 of Article 4 of the Treaty provided:

‘En cas de violation flagrante de l’article 2 du présent traité ou de contravention flagrante aux articles 42 ou 43 du Traité de Versailles³ par l’une des Hautes Parties contractantes, chacune des autres Puissances contractantes s’engage dès à présent à prêter immédiatement son assistance à la Partie contre laquelle une telle violation ou contravention aura été dirigée dès que ladite Puissance aura pu se rendre compte que cette violation constitue un acte non provoqué d’agression et qu’en raison . . . du rassemblement de forces armées dans la zone démilitarisée une action immédiate est nécessaire. . . .’

This paragraph may, of course, merely state the existing position, and permit collective action against unprovoked aggression or threat of attack. The question of interpretation which it raises will be pursued below.⁴

(b) *Use of force as a consequence of ‘provocation’*

A number of treaties of alliance and mutual guarantee concluded between 1920 and 1930 provide for assistance only in case of ‘unprovoked’ attack or in case a party is attacked ‘without provocation on his part’.⁵ This

¹ The status of forcible reprisals and various types of intervention were still matters of controversy.

² *League of Nations Treaty Series*, vol. 154, p. 290; *Politische Verträge*, vol. 1, No. 55. And see below, p. 199, n. 4.

³ *American Journal of International Law*, 13 (1919), Suppl., p. 151 at pp. 164–5.

⁴ Below, p. 216.

⁵ See *Politische Verträge*, *passim*. Even after 1930 the qualification still appears occasionally. See France and U.S.S.R., Treaty of Mutual Assistance, signed 2 May 1935, *ibid.*, No. 167, Article 2; Additional Treaty to the Treaty of Friendship . . . 1930, and to the Pact of Mutual Understanding, 1933, Greece and Turkey, signed 27 April 1938, *British and Foreign State Papers*, vol. 142, p. 612, Article 1. See also *Documents on British Foreign Policy, 1919–1939*, Third Series, vol. 1, pp. 84, 96, 225.

qualification was, however, rare after 1930, and even in the period under discussion it occurred principally in treaties of defensive alliance in which it would be convenient to have a *casus foederis* which permitted graceful withdrawal from responsibilities under the Treaty. The phrase and the concept it described were a product of the political alliances and diplomacy of the nineteenth century,¹ and its disappearance cannot be regretted. The concept was extremely vague and any act or omission by the authorities of a State could be regarded as provocation if it displeased a powerful opponent.² Even if the term were restricted, which it was not, to some military activity or frontier crossing, it justified a full-scale assault, a formal war, and had no regard for a principle of proportionality. Though often employed in State practice it received little attention from the jurists,³ and this indicates that at a time when war could be justified on a variety of vague grounds the concept had remained essentially political. The concept was absent from all important multilateral instruments in force after 1920 with the exception of the Locarno Treaty⁴ and the Inter-American Treaty of Reciprocal Assistance of 1947,⁵ and from nearly all bilateral treaties after 1930. Its brief reappearance in diplomatic exchanges in 1938 and 1939⁶ illustrated its futility and eminently political character. It is considered that the concept belongs to the Europe of the balance of power and became incongruous with the legal developments after 1920.

¹ See *The War Speeches of William Pitt the Younger* (1940), pp. 62 et seq., 68, 76, 89-90, 94, 95, 120, 143, 171, 250; *British Documents on the Origins of the War, 1898-1914*, vol. 10, Part II, pp. 432, 607; Part I, p. 25; vol. 11, pp. 214, 231, 241, 308; First Treaty of Alliance, Austria-Hungary, Germany and Italy, 20 May 1882, Pribram, *The Secret Treaties of Austria-Hungary*, vol. 1, p. 65, Articles II, III; *ibid.*, p. 79, Article II; Agreement between Italy and Spain, 1887, *ibid.*, p. 117; Third Treaty of Triple Alliance, 1891, *ibid.*, p. 151, Articles II, III; Treaty of Alliance, Austria-Hungary and Roumania, 1892, *ibid.*, p. 165, Article 2 (cf. pp. 203, 261); Fourth Treaty of Triple Alliance, *ibid.*, pp. 221, 237, 245. See also Rivier, *Principes du droit des gens*, vol. 2, p. 203.

² The concept of provocation appeared in the diplomatic exchanges concerning German policy in 1939. See *Documents on British Foreign Policy, 1919-1939*, Third Series, vol. 1, pp. 330, 334, 335, 456 (Halifax: 'No doubt the question of provocation was one on which there would always be two opinions . . .'), 478; vol. 2, pp. 123, 124, 140, 283, 330, 469 (Hitler states that it is impossible to define provocation); vol. 3, pp. 12, 24, 527-8; vol. 4, pp. 421, 431 (Nos. 464, 465), 454, 554; vol. 5, p. 598; vol. 7, pp. 178, 228, 481, 498. See *Collective Security* (ed. Bourquin), p. 319, for criticism by Pella.

³ Exceptions: Giraud, *Recueil des cours*, 49 (1934-III), pp. 716-17, 756-9; Scelle, *Esprit international* (1936), pp. 386-7; Rey, *La Guerre russo-japonaise au point de vue du droit international* (1911), p. 182; Morin, *Les Lois relatives à la guerre* (Paris, 1872), p. 181; Hertz, *Das Problem des Völkerrechtlichen Angriffs* (1935), p. 44. Cf. *Report of Committee on Security Questions* (1933), p. 32. See also criticism of the concept by Bustamante y Sirven, *Droit international public*, vol. 4, pp. 177-8; and Diamandescu, *Le problème de l'agression . . .* (1936), pp. 18 et seq.

⁴ It is to be noted that the obligations of the Locarno Treaty were expressly reserved by Britain, France and Germany before signature of the General Treaty and that the United States in a Note of 23 June 1928 stated that the Treaty did not conflict with the Locarno Treaty: see Hunter Miller, *The Peace Pact of Paris* (1928), pp. 177, 186, 192, 196, 203, 213. Komarnicki, *Recueil des cours*, 75 (1949-II), p. 33, remarks that this 'nebulous conception' of provocation in the Locarno Treaty weakened the value of the guarantees.

⁵ *United Nations Treaty Series*, vol. 21, p. 77, Article 9.

⁶ See n. 2 above.

(c) Article 16 of the Covenant

The Covenant provided for sanctions against the aggressor with the object of reinforcing the provisions for peaceful settlement, policing the aggressor, i.e. containing or defeating him, and perhaps punishing the aggressor State.¹ In effect the action contemplated was very much like collective defence under a mutual security pact or defensive alliance. There was, however, a distinction in that the purpose of action under Article 16, apparent from the terms of the article, was to provide a sanction for the provisions of the Covenant. Action legalized under Article 16 was accepted by States as a major category of justified force, and appeared in the provisos contained in various treaties of non-aggression and mutual guarantee.²

(d) Action in collective defence

During this period numerous treaties of mutual guarantee and defensive alliance were concluded on the firm assumption that collective defence was legal providing the provisions of the Covenant of the League were observed. Thus Article 2 of the Treaty of Guarantee between Poland and Roumania signed on 26 March 1926³ provided in part:

'Dans le cas où le Conseil de la Société des Nations . . . n'aurait pu réussir à faire accepter son rapport par tous les Membres autres que les représentants des parties au différend et où la Pologne ou la Roumanie se verrait attaquée sans l'avoir provoqué, la Pologne et réciproquement la Roumanie, agissant par l'application de l'article 15, alinéa 7, du Pacte de la Société des Nations, lui prêterait immédiatement aide et assistance.'

Article 10 of the Covenant implied an obligation to aid the victim of aggression, but it was interpreted in such a way that such aid was permitted rather than obligatory. Action under Article 16 had an aspect of collective defence. Numerous treaties of guarantee or defensive alliance provided for reciprocal aid in case of attack without making this conditional on exhaustion of means of peaceful settlement within the terms of Article 15

¹ The latter object was probably not present to the minds of the draftsmen.

² Poland and Roumania, Treaty of Guarantee, signed 26 March 1926, *League of Nations Treaty Series*, vol. 60, p. 162, Article 2; and Treaty of Guarantee, signed 15 January 1931, *ibid.*, vol. 115, p. 172, Article 2; Treaty of Locarno, signed 16 October 1925, *ibid.*, p. 198, Article 2; France and Roumania, Treaty of Friendship, signed on 10 June 1926, *ibid.*, vol. 58, p. 226, Article 1; France and Kingdom of Serbs, Croats and Slovenes, Treaty of Friendly Understanding, signed 11 November 1927, *ibid.*, vol. 68, p. 374; Greece and Roumania, Pact of Non-Aggression and Arbitration, signed 21 March 1928, *Politische Verträge*, vol. 1, No. 80, Article 1; Greece and Kingdom of Serbs, Croats and Slovenes, Pact of Friendship, signed 27 March 1929, *League of Nations Treaty Series*, vol. 108, p. 202, Article 2; France and Czechoslovakia, Treaty of Mutual Guarantee, signed 16 October 1925, *ibid.*, vol. 54, p. 360, Article 1; France and Poland, Treaty of Mutual Guarantee, signed 16 October 1925; *ibid.*, p. 354, Article 1.

³ *League of Nations Treaty Series*, vol. 60, p. 162. See also the provisions referred to in the last note.

of the Covenant.¹ In other cases there was provision for aid subject to the decision of the Council of the League.² The General Treaty for the Renunciation of War gave freedom of action to signatories against a State violating the Treaty but there is little similarity between this and obligations of collective defence.³ The question of 'collective self-defence', as opposed to that of sanctions, received little attention from the jurists before the Second World War but there was no denial that defence of others was legal.⁴

(e) *The right of legitimate defence*

Many treaties of the period reserve a 'right of legitimate defence'. The significance of the reservations will be considered in the context of a general discussion of the meaning of 'legitimate defence' or 'self-defence' in the period 1920-39 which follows.

IV. THE RIGHT OF LEGITIMATE DEFENCE. DOCTRINE AND STATE PRACTICE IN THE PERIOD 1920-39

Doctrine and State practice of the period 1920-29

The degree of identity and confusion between the right of self-defence, on the one hand, and self-preservation and necessity, on the other, which exists in the pronouncements of statesmen and writers of the nineteenth century has been emphasized previously. Self-defence was regarded as an incident of, or as synonymous with, the right of self-preservation. The confusion is epitomized by Westlake⁵ who, after remarking that the right of self-preservation is merely that of self-defence, goes on to state that:

'A State may defend itself, by preventive means if in its conscientious judgment necessary, against attack by another State, threat of attack, or preparations or other conduct from which an intention to attack may reasonably be apprehended. . . .

¹ E.g. Poland and Roumania, Convention of Defensive Alliance, signed 3 March 1921, *League of Nations Treaty Series*, vol. 7, p. 78; Italy and Albania, Treaty of Defensive Alliance, signed 22 November 1927, *ibid.*, vol. 69, p. 342.

² Declaration of Governments of the British Empire, France, Italy and Japan, on Albania, signed at Paris on 9 November 1921, *ibid.*, vol. 12, p. 392; *Politische Verträge*, vol. 1, No. 23; Treaty of Locarno signed 16 October 1925, above, pp. 198, 199, Article 4, para. 2. See Wehberg, *The Outlawry of War* (1931), p. 101.

³ See statement by Stimson of 30 December 1929: 'The Pact contains no covenant similar to that in the Covenant of the League of Nations providing for joint forceful action by the various signatories against an aggressor.' *American Journal of International Law*, 25 (1931), Suppl., p. 90, n. quoted with approval by Bowett, *Self-defence in International Law*, p. 203, n.

⁴ Those asserting the legality of such action: Le Fur, *Revue générale de droit international public*, 26 (1919), p. 74; Descamps, *Recueil des cours*, 31 (1930—I), p. 475; Phillimore, *ibid.*, 1 (1923—I), p. 45; Baty, *The Canons of International Law* (1930), p. 99; De Brouckère, *Recueil des cours*, 50 (1934—IV), pp. 34-36; Barandon, *Le système juridique de la Société des Nations pour la prévention de la guerre* (1933), p. 297. See also Yepes, *Recueil des cours*, 71 (1947—II), pp. 257-68. Until 1939 the legal position was obscured by the political categories of 'treaties of guarantee' and of 'defensive alliance': cf. Oppenheim, *International Law* (8th ed.), vol. 1, pp. 964-7.

⁵ *International Law* (1904), vol. 1, 299.

In attack we include all violation of the legal rights of itself or of its subjects, whether by the offending state or by its subjects without due repression by it, or ample compensation when the nature of the case admits compensation.'

- The customary law, so far as it can be ascertained from the vague and contradictory materials, equated legitimate defence with self-help. Discussions of the 'right of legitimate defence' by writers in the decade 1920-30 continued this treatment of the law.¹ 'Legitimate defence' involved action to prevent or redress violation of legal rights. Many writers in this period did not introduce the category since it was superfluous if a broad right of self-preservation or right to resort to war as a means of settlement were asserted.

The right of legitimate defence, defined in terms of self-help, could hardly exist without considerable modification in the period of the League Covenant. The Covenant merely placed conditions precedent on resort to forcible self-help, but, when justified use of force was defined in State practice, it was frequently in terms of legitimate defence against armed attack, or threat thereof, or against 'unprovoked aggression', and also of action under Article 16 of the Covenant. The State practice does not provide any precise definition of aggression, attack, resort to force and other similar terms, but it gives the strongest indication that, apart from Article 16, force was justified only in reaction against some armed attack or threat of force. The State practice of the decade after 1920 is, of course, marred by the use of the concept of provocation, but legitimate defence appears always in the context of the threat or use of force: it is possible to conclude that States used the terms 'defence', 'defensive alliance' and 'legitimate defence' in their natural meaning,² i.e. as reaction to imminent or actual violence. The State practice thus stands in contrast to the writers, who stated the customary law in so far as chaos was reducible to lucid exposition, and ignored or underestimated both the effect of the Covenant and the tendency of State practice after 1920.

An interesting example of the attitude of politicians toward self-defence occurs in the records of the Allied Supreme Council in 1920. Trumbitch, delegate of the Serb-Croat Slovene State, opposed a proposal that certain

¹ Verdross, *Recueil des cours*, 30 (1929—V), pp. 481 seq.; Seferiades, *ibid.*, 34 (1930—IV), pp. 391 et seq.; Cavaglieri, *Nuovi studi sull'intervento* (1928), pp. 25-32.

² It is admitted that 'natural meaning' is perhaps a chimera, but its definable substance is the meaning most frequently given to a term by persons using similar terms of reference, e.g. statesmen and diplomats. Cf. Lauterpacht, *The Development of International Law by the International Court* (1958), pp. 52-60. Writers of the decade who discussed defensive war in the context of developments in the law after 1920 gave the term the 'natural meaning' assumed in the text above. See Wehberg, *The Outlawry of War* (1931), p. 100 (first published in *Recueil des cours*, 24 (1928—IV), p. 151; and De Lapradelle, *Les Principes généraux du droit international* (1930), 16^e leçon, pp. 9-10: 'La renonciation à la guerre ne prive nullement l'Etat de son droit, qui est un droit primordial, de légitime défense en cas d'invasion ou d'attaque de son territoire.' See further De Visscher, *Bibliotheca Visseriana*, vol. 2, pp. 107-9, where he defines legitimate defence in terms of actual or imminent armed incursions (see his examples).

territory of his State should be demilitarized by reference to the right of self-defence under the Covenant of the League. He said:¹

'I believe that the League of Nations also lays down the principle that frontier defence is a better guarantee for general peace than disarmament, i.e., the impossibility of self-defence.'

'Even the international conventions, which provided for neutralisation (concerning Belgium and Switzerland, for instance), preserved intact the right of neutral countries to defend their frontiers by force of arms. Demilitarisation of our frontier would infringe our right of self-defence.'

With reference to the Geneva Protocol² the report to the Fifth Assembly of the League by Politis and Benes stated:³

'La prohibition n'atteint que la guerre d'agression. Il va de soi qu'elle ne s'étend pas à la guerre défensive. Le droit de légitime défense demeure respecté comme il doit l'être. L'état attaqué conserve entière la liberté de résister de toutes ses forces aux actes d'agression dont il serait victime . . . il peut et doit commencer pour se défendre par ses propres moyens.'

Treaties of guarantee, mutual assistance and defensive alliance concluded in this period contemplated aid against the threat or use of force, or 'war'. There is no indication that States understood 'attack' in the sense accorded to that term by Westlake. However, the view taken for purposes of mutual assistance did not necessarily supersede the view of legitimate defence which might be taken by individual States under international law. But it is nevertheless difficult to assume that States individually continued to equate the right of legitimate defence with self-help at a time when the illegality of self-help was increasingly apparent. It must be remembered that in this decade there was considerable emphasis both in draft treaties⁴ and in the Locarno Treaty on the need to restrict self-help *even in cases of armed attack and frontier incidents*, action being deferred whenever possible⁵ until the Council had had an opportunity for action. In this atmosphere it would have been difficult to maintain that force could be used to redress *any* violation of legal rights. In a telegram to the Secretary-General of the League on 24 October 1925, the Greek Government stated, in regard to the Greek incursion into Bulgaria:⁶

'It is therefore clear that all the measures which the military command has been compelled to take are nothing but measures of legitimate defence.'

¹ *Documents on British Foreign Policy, 1919-1939*, First Series, vol. 2, No. 67, p. 815, at p. 821; 12 January 1920.

² Hudson, *International Legislation*, vol. 2, No. 128.

³ A. 135, 1924; A. 1924, P., p. 487.

⁴ See the Geneva Protocol of 1924, above, n. 2.

⁵ Thus under the Locarno Treaty the parties could take action immediately only in case of flagrant aggression (Article 4).

⁶ *League of Nations Official Journal* (1925), Part II, p. 1697.

At the meeting of the Council on 28 October, the President, M. Briand, made the following observations:¹

'He had understood the representative of Greece to indicate that all these incidents would not have arisen if his country had not been called upon to take rapid steps for its legitimate defence and protection. It was essential that such ideas should not take root in the minds of nations which were Members of the League and become a kind of jurisprudence, for it would be extremely dangerous. Under the pretext of legitimate defence, disputes might arise which, though limited in extent, were extremely unfortunate owing to the damage they entailed. . . . The League of Nations . . . offered the nations a means of avoiding such deplorable events.'

The tenor of the Covenant and the interpretation put upon it by the Council was that States should avoid self-help whenever possible and not worsen any situation by vigorous riposte.

The term 'legitimate defence' appears most frequently in treaties of this period. Article 2 of the Locarno Treaty provided in part as follows:

'L'Allemagne et la Belgique et de même l'Allemagne et la France s'engagent réciproquement à ne se livrer de part et d'autre à aucune attaque ou invasion et à ne recourir de part et d'autre en aucun cas à la guerre.

'Toutefois cette stipulation ne s'applique pas s'il s'agit:

'1. De l'exercice du droit de légitime défense, c'est-à-dire de s'opposer à une violation de l'engagement de l'alinéa précédent ou à une contravention flagrante aux articles 42 ou 43 du dit Traité de Versailles lorsqu'une telle contravention constitue un acte non provoqué d'agression et qu'en raison du rassemblement de forces armées dans la zone démilitarisée une action immédiate est nécessaire.'

Article 1 of the Treaty of Friendship between France and Roumania signed on 10 June 1926² was identical in its provision but the proviso was as follows: 'De l'exercice du droit de légitime défense, c'est-à-dire de s'opposer à un engagement pris dans l'alinéa premier du présent article.'

Article 1 of the Treaty of Non-Aggression and Arbitration between Greece and Roumania, signed on 21 March 1928,³ provides similarly but merely reserves the right of legitimate defence without further elaboration.

The Locarno Treaty has a specific character because of its reference to breach of Articles 42 or 43 of the Treaty of Versailles as a justification for self-defence. Apart from this special case the right of legitimate defence

¹ *League of Nations Official Journal* (1925), Part II, p. 1709. See also Wehberg, *op. cit.*, pp. 46 et seq.; Report by Borel and Politis to the *Institut de Droit International (Annuaire, 1927, vol. 2, p. 698)*, quoted in Wehberg, *op. cit.*, p. 51; and the recommendations of the Committee of the Council on Article 11 of the Covenant approved on 15 March 1927; *League of Nations Official Journal* (1927), p. 832, and in Wehberg, *op. cit.*, p. 136.

² *League of Nations Treaty Series*, vol. 58, p. 226; *Politische Verträge*, vol. 1, No. 64. In the same terms: Treaty of Friendly Understanding, France and the Kingdom of Serbs, Croats and Slovenes, signed 11 November 1927, *League of Nations Treaty Series*, vol. 68, p. 374; *Politische Verträge*, vol. 1, No. 76, Article 1; Pact of Friendship, Greece and Kingdom of Serbs, Croats and Slovenes, signed 27 March 1929, *League of Nations Treaty Series*, vol. 108, p. 202; *Politische Verträge*, vol. 1, No. 93, Article 2.

³ *League of Nations Treaty Series*, vol. 108, p. 188; *Politische Verträge*, vol. 1, No. 80.

is to arise when a resort to force occurs. Of great interest is the draft text of a model treaty of mutual assistance recommended by the Assembly of the League for examination by member and non-member States by a resolution of 26 September 1928.¹ This has a close relation to the treaties just cited. Article 1 provides:²

‘Chacune des Hautes Parties Contractantes s’engage, vis-à-vis de chacune des autres Parties, à ne se livrer à aucune attaque ou invasion et à ne recourir en aucun cas à la guerre contre une autre Partie contractante. Toutefois, cette stipulation ne s’applique pas s’il s’agit:

‘1. De l’exercice du droit de légitime défense, c’est-à-dire de s’opposer à une violation de l’engagement pris dans l’alinéa premier;

‘2. D’une action en application de l’article 16 du Pacte de la Société des Nations;

‘3. D’une action en raison d’une décision prise par l’Assemblée ou le Conseil de la Société des Nations, ou en application de l’article 15, alinéa 7, du Pacte de la Société des Nations, pourvu que, dans ce dernier cas, cette action soit dirigée contre un État qui, le premier, s’est livré à une attaque.’

*The General Treaty for the Renunciation of War and
reservations to it, in particular those relating to the right
of legitimate defence or self-defence*

A condition precedent for the signing of the Treaty was agreement by the interested States on reservation of the right of legitimate defence. Kellogg’s original conception was of a complete renunciation of war; however, on 1 March 1928 he assured the French Ambassador that the renunciation of war ‘would not deprive the signatories of the right of legitimate defence’.³ A French Note to the United States Government on 30 March 1928⁴ referred to this assurance and reserved the obligations of the Covenant and the Locarno agreements. On 20 April 1928 the French Government submitted a draft treaty⁵ to the Governments of Great Britain, Germany, Italy, Japan and the United States, in Article 1 of which the parties renounced war as an instrument of national policy ‘sans entendre porter atteinte à l’exercice de leurs droits de légitime défense dans le cadre de traités existants, notamment lorsque ceux-ci assimilent la violation de certaines de leurs dispositions à un acte hostile’.

In a Note of 19 May 1928 to the United States Government,⁶ the British Government reserved the right of self-defence and the obligations of the Covenant and Locarno. It also stipulated as follows:

‘... there are certain regions of the world the welfare and integrity of which

¹ A. 1928, P. 170.

² Text: *Traité D, A. 1928, P.*, pp. 513 et seq.; quoted by Mandelstam, *Le Conflit italo-éthiopien devant la Société des Nations* (1937), pp. 301-4.

³ Hunter Miller, *The Peace Pact of Paris* (1928), p. 43.

⁴ *Ibid.*, p. 177.

⁵ *Ibid.*, p. 186.

⁶ *Ibid.*, p. 196. This was a reply to the U.S. Note of 13 April, to which was annexed a draft treaty the text of which was identical with that of the treaty eventually signed; *ibid.*, pp. 182, 184.

constitute a special and vital interest for our peace and safety. His Majesty's Government have been at pains to make it clear in the past that interference with these regions cannot be suffered. Their protection against attack is to the British Empire a measure of self-defence. It must be clearly understood that His Majesty's Government in Great Britain accept the new treaty upon the distinct understanding that it does not prejudice their freedom of action in this respect.'

A Japanese Note of 26 May simply reserved the 'right of self-defence' and the obligations of the Covenant and Locarno.¹ The South African Note of 15 June reserved the obligations of the Covenant and the 'natural right of legitimate self-defence'.²

Of decisive importance was the United States Note of 23 June 1928³ in which the construction of the United States draft treaty of 13 April was explained. It was stated that no conflict with the Covenant was intended and that similarly there was no conflict with the treaties of Locarno. Resort to war in violation of the Locarno treaties would also be a breach of the multilateral anti-war treaty. On the question of self-defence the Note stated:⁴

'There is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right of self-defence. That right is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defence. If it has a good case the world will applaud and not condemn its action. Express recognition by treaty of this inalienable right, however, gives rise to the same difficulty encountered in any effort to define aggression. It is the identical question approached from the other side. Inasmuch as no treaty provision can add to the natural right of self-defence, it is not in the interest of peace that a treaty should stipulate a juristic conception of self-defence since it is far too easy for the unscrupulous to mould events to accord with an agreed definition.'

In the course of July the recipients of this Note notified acceptance of the slightly revised American draft of 23 June⁵ and expressly accepted or 'noted' the interpretations put upon it in the United States Note of 23 June.⁶ The Czechoslovak Note of 20 July⁷ noted the reservations and stated that 'each power is entirely free to defend itself according to its will and its necessities against attack and foreign invasion'.

¹ Hunter Miller, *The Peace Pact of Paris* (1928), p. 203.

² *Ibid.*, p. 211.

³ *Ibid.*, p. 213; *Politische Verträge*, vol. 1, p. 242. The Note was sent to the Governments of Australia, Belgium, Canada, Czechoslovakia, France, Germany, Great Britain, India, the Irish Free State, Italy, Japan, New Zealand, Poland and South Africa.

⁴ Quoting Kellogg's Address to the American Society of International Law on 28 April.

⁵ *Politische Verträge*, vol. 1, p. 220. This differed from the draft of 13 April in that the preamble and reference to the signatories had been revised.

⁶ *Ibid.*, pp. 223, 224, 226, 227, 228, 229, 230, 232, 234, 236, 238, 239, 243.

⁷ *Ibid.*, p. 240. Text of Roumanian Note in similar terms: 70 *Congress Record, Daily Edition*, p. 1144; and in Myers, *Origins and Conclusion of the Paris Pact* (1929), p. 167. See also the Persian Note, 3 October 1928; *ibid.*, p. 166.

On these conditions the instrument was signed without the reservations appearing in the text. Four questions require discussion: the right of Governments to make independent determination of a necessity for self-defence, the meaning of legitimate defence in the correspondence preceding signature of the treaty, the validity of the reservation concerning the Locarno treaties, and the relation of the General Treaty to the Covenant.

Determination of necessity for legitimate defence

The American Note of 23 June 1928 has sometimes been understood as allowing States to determine for themselves the character of their action as self-defence.¹ In the report of the Foreign Relations Committee of the United States Senate which recommended ratification of the General Treaty the following passage appeared:²

'The committee reports the above treaty with the understanding that the right of self-defence is in no way curtailed or impaired by the terms or conditions of the treaty. Each nation is free at all times and regardless of the treaty provisions to defend itself, and is sole judge of what constitutes the right of self-defence and the necessity and extent of same.'

For purposes of interpretation the diplomatic correspondence must be decisive, and the words of Kellogg, quoted with approval in the Note of 23 June, are not unequivocal on this point. His words might equally be consistent with an intention to state that a State could decide on the *immediate* requirements of a situation, this being subject to a subsequent evaluation by the international community. Thus he says: 'If it has a good case, the world will applaud and not condemn its action.'

Even if it be admitted that he did intend to make each State the ultimate judge of its own actions in this respect,³ his words must be construed in the light of his assumption that the document was a treaty. As such it was intended and understood by its signatories and, apparently, its adherents, to be a legal instrument governing international relations. The interpretation of a treaty is not a matter of domestic jurisdiction but a question of

¹ E.g. Tucker, *International Law Quarterly*, 4 (1950), p. 21; Wehberg, *The Outlawry of War* (1931), pp. 85-86; Borchard, *American Journal of International Law*, 23 (1929), p. 117; Pella, *Revue de droit international* (Sottile), 33 (1955), p. 19, n. See also the Report of the Lytton Commission, quoted *American Journal of International Law*, 27 (1933), p. 48, n.; Brown, *ibid.*, pp. 100-2; Mandelstam, *op. cit.*, p. 321; Barandon, *Le Système juridique de la Société des Nations pour la prévention de la guerre* (1933), pp. 300, 301; Le Gall, *Le Pacte de Paris du 27 août 1928* (1930), pp. 106-7, 143.

² 70th Congress, 2nd session, Ex. Rep. No. 1, *Congress Records* (15 January 1929), vol. 70, pp. 1930-1. See also, *ibid.* (3 January 1929), pp. 1063-134.

³ See the French Note of 14 July 1928 (Miller, *op. cit.*, p. 224): '[Each nation] alone is competent to decide whether circumstances require recourse to war in self-defence.' This is also ambiguous but the French Government was probably not distinguishing between a first instance decision to act in self-defence and a subsequent legal determination. See also the Czechoslovak Note of 20 July, *ibid.*, p. 240.

international concern to be determined in accordance with international law.¹ Three approaches may be made to the problem. First, it may be said that every State has the right to make its own determination but to qualify this by saying that the determination must be in accordance with principles of good faith and international law.² This suggestion is attractive and simple: a State which ignores rules of international law or manifestly proven facts in making a determination has not made a determination which other States are bound to accept. However, this approach still leaves opportunities for mistakes, albeit honest ones, and it involves the somewhat vague requirements of 'good faith'.

Alternatively, recourse may be had to the principle of effectiveness or variants thereof: certain writers have asserted that to accept the view that a party is free to make its own final determination would have absurd results and considerably reduce the efficacy of the General Treaty.³ Indeed, Lauterpacht⁴ has stated that if the parties are free, not merely to make a provisional determination of the necessity to act but also to determine with conclusive finality the lawfulness of their own action, then the Treaty would not be a legal instrument. Furthermore, in its Judgment the International Military Tribunal at Nuremberg observed:⁵

'But whether action taken under the claim of self-defence was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced.'

Yet appeal to the principle of effectiveness is not in itself persuasive since

¹ *Nationality Decrees issued in Tunis and Morocco, P.C.I.J., Series B, No. 4, pp. 26, 28; Interpretation of Peace Treaties (First Phase), I.C.J. Reports, 1950, pp. 70-71.*

² Verdross, *Friedens-Warte*, 30 (1930), p. 65. See also references to good faith by Descamps, *Revue de droit international et de législation comparée*, 10 (1929), p. 168; Gonsiorowski, *American Political Science Review*, 30 (1936), pp. 665-6.

³ Brierly, this *Year Book*, 10 (1929), p. 209; also in *Recueil des cours*, 58 (1936-IV), pp. 130-1; De Brouckere, *ibid.*, 50 (1934-IV), p. 33; Giraud, *ibid.*, 49 (1934-III), pp. 800, 810; Basdevant, *ibid.*, 58 (1936-IV), p. 549; Accioly, *Traité*, vol. 1, p. 461; Lauterpacht, *The Function of Law in the International Community*, pp. 177-82; Oppenheim, *International Law*, vol. 2, pp. 187-8; Wright, *American Journal of International Law*, 27 (1933), pp. 41-48. See also Oppenheim, *op. cit.*, vol. 1 (8th ed.), p. 299; Briggs, *The Law of Nations* (2nd ed.), p. 985; Jessup, *A Modern Law of Nations* (1956), pp. 163 et seq.; Brierly, *The Law of Nations* (5th ed.), pp. 319-21; Wehberg, *Recueil des cours*, 78 (1951-I), p. 47.

⁴ *Transactions of the Grotius Society*, 20 (1934), p. 178 at pp. 188-9, 198-201.

⁵ *Judgment*, Cmd. 6964, p. 30. See also the Judgment of the International Military Tribunal for the Far East, Sohn, *Cases on United Nations Law*, p. 913. In the *Lawless case (Merits)*, 1961, the European Court of Human Rights considered the meaning of Article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 (Cmd. 8969, 1953); *United Kingdom Treaty Series*, No. 71 (1953). Para. 1 of the article provides: 'In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.' In its Judgment the Court referred to this and the other provisions of Article 15 and stated that 'it is for the Court to determine whether the conditions laid down in Article 15 for the exercise of the exceptional right of derogation have been fulfilled in the present case' (text of Judgment, Council of Europe, Doc. A.63. 550, at p. 35). Cf. the individual Opinion of G. Maridakis, *ibid.*, p. 46.

the International Court will not necessarily apply the principle and, in any case, will not rely on it alone. In the present case reference to 'natural meaning' would probably give different results although such an approach may not lead to any clear answer: if there were such a meaning no ambiguity would arise.¹ Again it might be suggested that the principle of restrictive interpretation would be equally applicable. However, in view of the statement of objects in the preamble and the forceful terms of the General Treaty itself, the latter principle would probably not be applied to an instrument like the present and in any event it does not feature in the recent practice of the Court.² A third approach to the problem, and, it is submitted, the most satisfactory, is to examine subsequent practice.³ It will be seen from the State practice that Japanese and Italian pleas of defensive necessity were not regarded as conclusive.⁴ And it may be remarked that Great Britain by implication recognized that no State could be the final arbiter in applying legal categories to facts when in a reservation it provided for a special category in relation to imperial interests.

The scope of the reservation of the right of legitimate defence

The signatories of the General Treaty reserved what they referred to variously in the diplomatic correspondence preceding it as the right of legitimate defence, the right of self-defence and the right of legitimate self-defence. There appears to be no reason for supposing that these terms were used with different meanings. It has already been noticed that State practice and works of authority in the period before 1920 and in the case of certain jurists,⁵ after 1920, regarded self-defence as a synonym for the right of self-preservation and hence included the redress of wrongs, i.e. the defence of rights, within the concept of self-defence. It has been suggested that the reservation to the General Treaty must be understood in the sense of the customary law.⁶ This mode of interpretation, it is submitted, is impermissible for a variety of reasons.

First, it is in contradiction to the provisions of the General Treaty. Article 2 requires peaceful settlement of disputes⁷ and, further, Article 1

¹ Cf. Lauterpacht, *The Development of International Law by the International Court* (1958), pp. 49-60.

² Recent instances are lacking: see *ibid.*, pp. 300-6. See also Fitzmaurice, this *Year Book*, 28 (1951), p. 9, where a formulation of the 'major principles of interpretation' excludes the principle of restrictive interpretation but includes the principle of effectiveness.

³ See on this principle of interpretation above, p. 193, n. 1.

⁴ Below, pp. 211-12.

⁵ Above, p. 196, n. 4. See also below, p. 218, n. 6.

⁶ On the alleged weakness in the General Treaty as a consequence of the reservation and its vague character: Borchard, *American Journal of International Law*, 23 (1929), p. 117; and in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1 (1929), p. 126. Cf. the vague formulation in Balbareu, *Le Pacte de Paris* (1929), pp. 79-80.

⁷ More literally, it stipulates that any mode of settlement must be peaceful. There is, in fact, no clear obligation to settle disputes at all.

contains a renunciation of war as an instrument of national policy and this would eliminate self-help. The legal character and effectiveness of the Treaty would be completely undermined if the variety of excuses to be found in the earlier doctrine on self-preservation and necessity were to be permitted. The principle of effectiveness, and also that of fulfilling obligations in good faith,¹ militate against an interpretation which would reduce it to a pompous futility.

Such an interpretation is not warranted by the language of the General Treaty as a whole. The solemn renunciation of war as an instrument of national policy, with the objects stated in the preamble, would seem to render justifications exceptional; whereas the right of legitimate defence to be found in nineteenth-century doctrine would have a contrary effect. Nor is a wide interpretation of the right of legitimate defence justified by the content of the reservations and diplomatic correspondence prior to signature. Setting aside the reservations as to the Locarno treaties, and the Covenant, and the British doctrine of special interests, the reservations do not in general define the right of legitimate defence. But in so far as any specific indication of its nature is given, it is in terms of defence against 'attack and foreign invasion'.² Kellogg himself regarded defence as the conjunct of aggression,³ and the common meaning of aggression in 1928 was attack or invasion or threat thereof.⁴ If the vague right of self-preservation was to be admitted in favour of all parties to the Treaty, the British reservation would have been superfluous; and it must be recalled that even that reservation refers to 'protection against attack' as a 'measure of self-defence'. In the periods immediately before and after the conclusion of the Treaty the term 'legitimate defence' appeared frequently in contexts in which it had the sense of justified reaction to attack or threat of attack. It may also be urged that the terms 'defence' and 'self-defence' have a natural meaning which involves necessary reaction against the use or threat of force. This interpretation of the reservation is consonant with the general trend in the Covenant and the practice of the League with its tendency towards restriction of self-help. Many jurists regard legitimate defence in the present context as reaction to actual or imminent attack or invasion.⁵ Some, while

¹ The two principles are of course related: cf. Lauterpacht, *op. cit.*, pp. 283, 292.

² Czechoslovak Note of 20 July 1928, quoted above, p. 206.

³ Above, p. 206.

⁴ Kellogg said that 'every nation is free at all times . . . to defend its territory from attack or invasion'. See *Politische Verträge* (1936), vol. 1, *passim*.

⁵ Wehberg, *op. cit.*, p. 85; Descamps, *Recueil des cours*, 31 (1930—I), p. 485; Basdevant, *ibid.*, 58 (1936—IV), 543-7 (but he is not certain about the defence of nationals on foreign territory); Gonsiorowski, *American Political Science Review*, 30 (1936), p. 664; Verdross, *Friedens-Warte*, 30 (1930), p. 65 (see, however, the same writer, *Recueil des cours*, 30 (1929—V), p. 487. See Stimson, 'Address before the Council on Foreign Relations, 8 August 1932', *Politische Verträge*, vol. 1, p. 257 at p. 264: 'Its limits have been defined by countless precedents. A nation which sought to mask imperialistic policy under the guise of the defence of its nationals would soon be unmasked.'

not equating it with a vague and comprehensive right of self-preservation, give the concept a meaning wider than that of reaction to force. Thus Eagleton thought it might include defence of property which a State considers essential.¹ This is not a correct interpretation of the reservation for the reasons just considered and for another, more decisive, reason. In solving the present problem of interpretation, as in other cases, the subsequent practice of parties to the Treaty is considered to be of the greatest significance. The practice of the period 1929-45 does not suggest that self-defence was anything other than a reaction to force or threat of force against the territory of a State although there were some cases which did not fit into the general pattern.² In answer to a United States Note in 1929 concerning hostilities between the Soviet Union and China in which those States were reminded of their obligations under the Treaty, the Soviet Government stated that it had acted in self-defence against armed bands³ operating from Chinese territory.⁴ When the League Council considered the Chinese complaint arising out of the hostilities with Japanese forces in Manchuria on 18 September 1931 and subsequently, the Japanese representative⁵ described the Japanese action as 'justifiable measures of self-protection on the standard principle laid down in the *Caroline* case,⁶ that every act of self-defence must depend for its justification on the importance of the interests to be defended, on the imminence of the danger, and on the necessity of the act'. In a report which was adopted by the Assembly of the League the Lytton Commission concluded:⁷

'The military operations of the Japanese troops during this night . . . cannot be regarded as measures of legitimate self-defence. In saying this, the Commission does not exclude the hypothesis that the officers on the spot may have thought they were acting in self-defence. . . .'

In the report⁸ adopted by the Special Assembly of the League on 24 February 1933, the following appears:

'Without excluding the possibility that, on the night of 18-19 September 1931, the Japanese officers on the spot may have believed that they were acting in self-defence, the Assembly cannot regard as measures of self-defence the military operations carried

Printed also in *Revue de droit international* (La Pradelle), 10 (1932), p. 640. See further Calogero-poulos-Stratis, *Le Pacte général de renonciation à la guerre* (1931), pp. 150-1, 156.

¹ *International Conciliation*, No. 264, p. 612.

² Viz. intervention to protect the lives and property of nationals and forcible prevention or self-help in case of breaches of neutrality. See below, pp. 212, 267.

³ On this type of activity: the present writer, *International and Comparative Law Quarterly*, 7 (1958), p. 712.

⁴ *United States Foreign Relations* (1929), vol. 2, p. 372; Degras, *Soviet Documents on Foreign Policy*, vol. 2, pp. 406, 413, 416.

⁵ *League of Nations Official Journal* (1931), p. 2365; *American Journal of International Law*, 27 (1933), p. 100.

⁶ Above, p. 186.

⁷ League Doc. 1932, VII, 12, p. 71.

⁸ A (Extra), 22, 1933, VII, 2, p. 17; *League of Nations Official Journal* (1933), Spec. Suppl., No. 112, pp. 22, 72.

out on that night by the Japanese troops at Mukden and other places in Manchuria. Nor can the military measures of Japan as a whole, developed in the course of the dispute, be regarded as measures of self-defence.'

These conclusions indicate, if no more, that self-defence was regarded in terms of military necessity of meeting force with force.¹ However, there is a certain ambiguity in the attitude of the League organs toward the Japanese plea of legitimate defence for the purpose of protecting the lives and property of nationals: it is not clear whether the facts or the law told against Japan.² Italian arguments in justification for the action against Ethiopia were in part based on necessity for action in face of Ethiopian military preparations and attacks.³ The League of Nations did not consider that this argument was justified by the facts and disregarded further Italian arguments that action to protect vital interests and security was justified and that Italy had the right to decide questions of self-defence for herself.⁴ Italy was stated by the Council and by some Governments separately to have acted in violation of the General Treaty.⁵

The British reservation

The British reservation to the General Treaty gave a particular content to the right of self-defence. It is just possible, though perhaps facile, to regard it as a statement of the obvious, viz. if certain areas are attacked the State attacking will have violated the General Treaty and be liable to attack itself as having lost the benefits of the Treaty.⁶ In fact the reservation, although it speaks of 'protection against attack', states that 'interference' in certain regions⁷ 'cannot be suffered'. In so far as it purports to reserve freedom of determination of defensive necessity, the reservation

¹ Following the Lukouchiao incident in 1937 and the ensuing Sino-Japanese conflict the League found that Japan had violated the General Treaty and rejected her plea of self-defence: Report of Far Eastern Committee, *League of Nations Official Journal*, Spec. Suppl., 117, p. 42; Resolution of Assembly, *ibid.*, No. 169, p. 148. Cf. *ibid.*, 1937, p. 655 (Chinese plea of self-defence).

² See the Council resolutions of 30 September, 24 October and 10 December 1931; *Official Journal* (1931), pp. 2307, 2340, 2358, 2374 et seq.

³ *League of Nations Official Journal* (1935), pp. 104, 641, 642, 1210-12, 1603.

⁴ Generally: Report of the League Council adopted on 7 October 1935; *American Journal of International Law*, 30 (1936), Suppl., pp. 1 et seq.; Wright, *ibid.*, p. 45; Mandelstam, *Le Conflit italo-éthiopien devant la Société des Nations* (1937), pp. 3-174.

⁵ Report of the 'Committee of Six' adopted by the Council on 7 October 1935, *League of Nations Official Journal* (1935), pp. 1223-6; *American Journal of International Law*, 30 (1936), pp. 50-51 and *ibid.*, Suppl., pp. 23, 25, 39. See also the U.S. Secretary of State to the Emperor of Ethiopia, Department of State Press Release, cited by Kuhn, *American Journal of International Law*, 30 (1936), p. 85; and *Peace and War, United States Foreign Policy, 1931-1941*, pp. 274, 296, 300.

⁶ See Briery, this *Year Book* 10 (1929), p. 209. See also Zimmern, *The League of Nations and the Rule of Law 1918-1935* (2nd ed.), p. 401, n., where he refers to a statement by Beckett in the Legal Committee of the Assembly on 18 September 1931.

⁷ Presumably the Persian Gulf and Egypt: Oppenheim, *International Law* (8th ed.), vol. 1, p. 319, n. See also *Parliamentary Debates, H.L.*, vol. 199, col. 660.

may be thought to be subject to the principles of effectiveness and reference to subsequent practice. Furthermore the reservation might be said to contradict the provision in Article 1 of the Treaty since it contemplates war as an instrument of national policy.¹ It is particularly significant that when Japan claimed a similar right of action in Manchuria this did not prevent the Assembly of the League from concluding that the matter was subject to legal qualification and that there was no justification for action in self-defence;² vital interests in a particular area did not excuse law-breaking. In 1934 the United States and British Governments expressly denied that Japan had the right to take action in China by virtue of her special interests in the area.³

It might be said that there is some room for doubting whether the British reservation bound other parties to the General Treaty. The usual rule is that a reservation to a multilateral treaty must receive unanimous consent and that failing this the party making the reservation has not become bound by the existing provisions of the treaty.⁴ The British reservation was not circulated to the original signatories and was not consented to by them.⁵ Indeed, Afghanistan, Egypt, Persia, Turkey and the U.S.S.R. expressly stated in Notes relating to their adherence to the Treaty that they were not bound by any reservations to the instrument.⁶ Protests against the British reservation were made by the Soviet, Persian and Turkish Governments and by the presidents of the Egyptian Senate and Chamber of Deputies.⁷ However, the British Government signed the Treaty and regarded itself thereafter as bound by it. The reservation had not been relied upon although it would have been apposite to do so in the Suez crisis of 1956.⁸ It is, however, possible to argue that States becoming parties to the Treaty and

¹ Hunter Miller, *The Peace Pact of Paris*, p. 40.

² See Wright, *American Journal of International Law*, 27 (1933), pp. 48-49. Criticism of the British reservation: Wehberg, *op. cit.*, p. 86; Balbareu, *Le Pacte de Paris*, pp. 90-92. The doctrine expressed cannot be regarded as collective self-defence but as an assertion of a right of individual self-defence since there is no agreement with the States concerned to act in concert: see Bowett, *Self-defence in International Law*, pp. 212-15. Some writers consider it to be a question of collective defence, however: Wehberg, *Recueil des cours*, 78 (1951-I), p. 47; Verdross, *Friedens-Warte*, 30 (1930), p. 66; Le Gall, *Le Pacte de Paris* . . . (1930), pp. 105-6.

³ For the Japanese claim to protect her special interests in China, *Documents on International Affairs* (1934), p. 472. British and American denials, *ibid.*, pp. 476, 477. See also Hyde, *American Journal of International Law*, 28 (1928), p. 431; and Willoughby, *The Sino-Japanese Controversy and the League of Nations* (1935), pp. 623-56.

⁴ Oppenheim, *op. cit.*, p. 914; *Reservations to the Genocide Convention*, *I.C.J. Reports*, 1951, p. 21.

⁵ With the exception of the United States as recipient of the British Note of 19 May 1928.

⁶ Texts of Notes in Myers, *Origin and Conclusion of the Paris Pact* (1929), pp. 160, 163, 166, 167. Turkish Note quoted: Gerould, *Selected Articles on the Pact of Paris* (1929), p. 158. Soviet Note of 31 August 1928 to the French Government also in Hunter Miller, *op. cit.*, p. 263; Degras, *op. cit.*, p. 335.

⁷ Vandy, *Revue générale de droit international public*, 37 (1930), p. 12; Foreign Policy Association, *Information Service*, vol. 4, No. 18, 9 November 1928, p. 309.

⁸ However, in a debate in the House of Lords Lord Kilmuir L.C. referred to the British and American reservations to support his general statement that the General Treaty did not forbid force in self-defence: *Parliamentary Debates, H.L.*, vol. 199, cols. 1353 et seq., 1 November 1956.

which did not protest against the reservation when they became aware of its content were estopped from denying its validity. But it must be doubted whether the doctrine of estoppel could apply to admit a reservation repugnant to the provisions and main purpose of the instrument.

The better view, it is suggested, is that the parties to the Treaty accepted the reservation on the implied condition that it was consistent with the fundamental purpose of the Treaty.¹ It is impossible to take the view that Great Britain is not bound by the General Treaty as a result of the reservation not receiving unanimous consent, and equally impossible to assume a capacity in the signatories and adherents of assenting to a reservation inconsistent with the object and purpose of the Treaty. This view accords with the behaviour of States bound by it and their attitude toward Japanese claims, and with the principles stated by the International Court in its Advisory Opinion on *Reservations to the Genocide Convention*.² It is readily admitted that in the Opinion it is stated that the appraisal of a reservation and the effect of objections to it depend upon the particular circumstances of each individual case,³ but there is considerable similarity between the General Treaty and the Genocide Convention. It has been seen that several adherents—the U.S.S.R., Egypt, Turkey and Persia—expressly declared that they did not accept the British reservation. An effective means of disposing of the reservation, though one which is formalist and only doubtfully valid in any case, is to regard it not as a reservation but merely as a part of the *travaux préparatoires*.⁴

Lastly, it is interesting to observe that in the draft Treaty of Friendship and Alliance between Great Britain and Egypt, accepted by the delegations of the two parties at London on 8 May 1930,⁵ there is no mention of the British reservation. Article 12 provided as follows:

‘Nothing in the present Treaty is intended to or shall in any way prejudice the rights and obligations which devolve, or may devolve, upon either of the High Contracting Parties under the Covenant of the League of Nations or the Treaty for the Renunciation of War. . . .’

The Monroe Doctrine

It is sometimes assumed that American signature of the General Treaty was conditional on acceptance by the other signatories of the implications

¹ To regard the reservation as repugnant is to meet the difficulty that this may lead to a conclusion that the United Kingdom is not a party to the General Treaty.

² *I.C.J. Reports*, 1951, pp. 21, 23–28. See Fitzmaurice, *International and Comparative Law Quarterly*, 2 (1953), p. 1; and in this *Year Book*, 33 (1957), p. 272.

³ *I.C.J. Reports*, 1951, p. 26; and see at p. 20.

⁴ Wright, *American Journal of International Law*, 27 (1933), p. 43; Oppenheim, *op. cit.* (7th ed.,) pp. 186–7, notes; Guggenheim, *Traité*, vol. 2, p. 297, n. 1. It is thought that the British Note had the character of a reservation.

⁵ Cmd. 3575, p. 35; *Politische Verträge*, vol. 1, p. 477. Cf. Article 10 of the Treaty of Alliance, signed on 26 August 1936; *United Kingdom Treaty Series*, No. 6 (1937); *American Journal of International Law*, 31 (1937), Suppl., p. 77.

of the Monroe Doctrine.¹ The report of the Senate Foreign Relations Committee recommending ratification stated that under the right of self-defence allowed by the Treaty must necessarily be included the right to maintain the Monroe Doctrine 'which is a part of our system of national defence'.² The British Note of 19 May 1928 implied acceptance of an American reservation as to the Monroe Doctrine.³ The United States Government nevertheless made no such reservation or any statement on the interpretation of the Treaty in this sense.⁴ It is submitted that the doctrine cannot be admitted as qualifying the obligations of the Treaty for the reasons stated for non-acceptance on the content of the British reservation.⁵ The Monroe Doctrine has a political character and its scope, as it was understood to be in 1928, rendered it incompatible with the provisions of the General Treaty; it was essentially an instrument of national policy. However, some States refused to become parties to the Treaty on the ground that the United States considered the Monroe Doctrine to be compatible with its provisions.⁶

The obligations of the Covenant

The replies of Governments to the United States Note of 13 April 1928⁷ and the French draft treaty of 20 April⁸ reserved the obligations of the Covenant, and in the United States Note of 23 June it was explained that in the view of that Government there was no necessary inconsistency between the Covenant and an unqualified renunciation of war.⁹ The latter Note stated that action under Article 10 of the Covenant was optional. In any case participation in action under Articles 10 and 16 would hardly constitute war as an instrument of national policy. The substantial inconsistency between the two instruments lay in the permission contained in Article 15, paragraph 7, of the Covenant. But the reservations concerned the 'obligations' of the Covenant and the permission of the Covenant to resort to war was replaced by the obligations of the General Treaty: moreover, paragraph 7 had always been ignored in State practice, at least as an

¹ An excellent short account is in Bowett, *op. cit.*, pp. 208-12.

² Above, p. 207, n. 2.

³ Hunter Miller, *op. cit.*, p. 196.

⁴ For a view that the doctrine was contained in the Treaty by implication: Wehberg, *op. cit.*, p. 85; and see Oppenheim, *op. cit.* (7th ed.), vol. 2, p. 187, n., where it is assumed that the United States included the doctrine in the right of self-defence (but see the text at p. 187).

⁵ Cf. Barandon, *op. cit.*, p. 298; Calogeropoulos-Stratis, *Revue hellénique de droit international*, 6 (1953), p. 225; Guggenheim, *Traité*, vol. 2, pp. 296-300 (omission of any reference). Some writers rationalized the doctrine in the present context by regarding it as collective defence: above, p. 213, n. 2.

⁶ E.g. Argentina: Wehberg, *op. cit.*, p. 80.

⁷ Hunter Miller, *op. cit.*, pp. 192 et seq.

⁸ *Ibid.*, p. 186; see also p. 177 (French Note of 30 March).

⁹ *Ibid.*, p. 213; see also p. 174 (Note of 27 February).

excuse for resort to self-help. The Treaty in effect complemented the Covenant.¹

The Locarno treaties

Parties to the General Treaty which were also bound by the Locarno treaties reserved their obligations thereunder² and the United States Government stated³ that these obligations were not incompatible with those of the Treaty as 'if the parties to the treaties of Locarno are under any positive obligation to go to war such obligation would not attach unless one of the parties has resorted to war in violation of its solemn pledges thereunder'. The parties to the Locarno treaties implicitly accepted this view of those treaties⁴ and this acceptance in effect neutralized two potential sources of incompatibility. First, the Locarno texts introduced the indefinite concept of provocation, which may have a wider connotation than the doctrine of legitimate defence; and, secondly, Article 2 of the Treaty of Mutual Guarantee defined legitimate defence as including action in case of violation of the demilitarized zone provided for in Articles 42 and 43 of the Treaty of Versailles.⁵

State practice and doctrine in the period 1930-39

It is not proposed to discuss in this section cases referred to in the course of examining the question of self-defence in the context of the General Treaty for the Renunciation of War. A feature common to the treaty practice relating to obligations of non-aggression and the like, in the periods before and after the General Treaty, is the preoccupation with the use of force, particularly attack or invasion.⁶ In this connexion a significant development was the appearance of the Conventions for the Definition of Aggression,⁷ the definition formulated being accepted also in the Protocol-

¹ See Hunter Miller, pp. 82-83, 86, 116, 129, 277-9. There was considerable discussion in the League of the question of harmonizing the Covenant and the General Treaty: there was an assumption that this was desirable but not essential and that the obligations of the Treaty were dominant. See Ray, *Commentaire*, pp. 75-77; Manning, this *Year Book*, 11 (1930), p. 158; Wehberg, *op. cit.*, pp. 88-93; Gallus, *Revue générale de droit international*, 37 (1930), pp. 19-42; Rutgers, *Recueil des cours*, 38 (1931-IV), p. 5.

² Hunter Miller, *op. cit.*, pp. 177, 186, 192, 196, 203.

³ Note of 23 June, *ibid.*, p. 213.

⁴ The German and British Notes of 27 April and 19 May respectively stated expressly that the American draft treaty of 13 April did not conflict with the obligations of the Locarno Treaty. See *ibid.*, pp. 192, 196.

⁵ Cf. French draft treaty in Note of 20 April 1928, which referred to 'l'exercice de leurs droits de légitime défense dans le cadre des traités existants' (Hunter Miller, *op. cit.*, p. 186).

⁶ See treaties in *Politische Verträge*, vols. 1, 2 and 3, *passim*.

⁷ Signed at London 3, 4 and 5 July 1933: *League of Nations Treaty Series*, vol. 147, p. 67; vol. 148, pp. 79, 211. See also Treaty of Friendship . . . , Turkey and Roumania, 17 October 1933; *Politische Verträge*, vol. 1, No. 138; Polish-Soviet Communiqué of 16 February 1934, Degras, *op. cit.*, vol. 3, p. 75; *Documents on British Foreign Policy, 1919-1939*, Third Series, vol. 6, p. 158, No. 137; Mexican Department of Foreign Relations, Opinion Concerning

Annex of the Balkan Entente.¹ The definition of aggression was in terms of the use of force, including, however, mere declaration of war and support to armed bands.² Parties to the Conventions agreed, in the Annex to Article III, that no act of aggression could be justified on the following grounds, among others:

'A. The internal condition of a State. . . .

'B. The international conduct of a State:

'E.g. the violation or threatened violation of the material or moral rights or interests of a foreign State or its nationals; . . . economic or financial boycotts; disputes relating to economic, financial or other obligations towards foreign States. . . .'

There was no express reservation of the right of self-defence, but presumably it arose whenever an act of aggression, as defined in the Conventions, occurred. The Saadabad Pact of 1937³ contained a similar though not identical definition of acts of aggression, which omitted support for armed bands and naval blockade but included aid and assistance to an aggressor. Article 4 provided that certain acts did not constitute acts of aggression, *inter alia*, 'the exercise of the right of legitimate self-defence, that is to say, resistance to an act of aggression as defined above'. Fourteen States were parties to at least one of the instruments just mentioned,⁴ and the texts support the view that legitimate defence was regarded as a reaction to some resort to force, or statement of an intention to resort to force, or aid to an aggressor. The Conventions of 1933 expressly precluded forcible action to defend interests or to settle disputes.

One anomalous incident in the treaty practice of this decade must be recalled. In the Treaty of Mutual Assistance between the U.S.S.R. and France signed on 2 May 1935,⁵ the concept of unprovoked aggression reappeared. It had continued relevance at this time for signatories of the Locarno Pact⁶ although they had accepted an interpretation of their obligations which made the Locarno Pact legally compatible with the General Treaty.⁷

Apart from the conflicts referred to previously in relation to the General Treaty and the treaties just mentioned, there is a paucity of directly relevant material on legitimate defence in the period under review.

the Dumbarton Oaks Proposals, *U.N.C.I.O. Documents*, vol. 3, p. 68; Observations of the Czechoslovak Government on the Dumbarton Oaks Proposals, *ibid.*, pp. 466, 469.

¹ Signed at Athens, 9 February 1934; *League of Nations Treaty Series*, vol. 153, p. 156.

² On 'use of force': below, p. 254.

³ Signed at Tehran, 8 July 1937; *League of Nations Treaty Series* vol. 190, p. 21.

⁴ U.S.S.R., Roumania, Poland, Afghanistan, Iran, Latvia, Estonia, Turkey, Lithuania, Czechoslovakia, Yugoslavia, Greece, Iraq, and Finland.

⁵ Articles 2 and 3; *Politische Verträge*, vol. 1, No. 167.

⁶ See above, pp. 198-9; and the British Note to France of 26 September 1935, *Politische Verträge*, vol. 1, No. 170; *The Times*, 30 September 1935.

⁷ Above, p. 216.

However, in the report of the Second Committee of the Hague Codification Conference in 1930, drafted by François,¹ there is a reference to 'un droit de légitime défense contre des attaques'. Treaties of alliance in this period provide for collective defence² against a resort to force, an attack, with one interesting exception. The Agreement of Mutual Assistance between Poland and Great Britain, signed on 25 August 1939,³ contains in Article 1 the usual undertaking to provide assistance in case one of the parties is 'engaged in hostilities with a European Power in consequence of aggression by the latter'. Article 2 states, *inter alia*, that Article 1 shall apply 'in the event of any action by a European Power which clearly threatened, directly or indirectly, the independence of one of the contracting parties, and was of such a nature that the party in question considered it vital to resist it with its armed forces'.⁴ It might be argued that this was to apply in case of a military attack which was imminent rather than actual, or to an ultimatum, but the wording conjures up a concept of defence which is expressed in terms of security and necessity. In contrast, the plea of self-preservation advanced when German forces occupied Bohemia and Moravia in March 1939 was repudiated by many Governments.⁵

The opinions of writers in the period preceding the Second World War are very much divided on the nature of legitimate defence. A few are still influenced by earlier doctrine and tend to disregard or minimize the more recent State practice: consequently they define self-defence in vague terms and sometimes link it with self-preservation.⁶ Some writers accept the view that aggression involves a resort to armed force, an attack which occurs across a frontier, and consequently regard legitimate defence as a proportionate reaction to such attack.⁷ Others do not accept the territorial criterion of aggression but nevertheless attempt to define legitimate defence narrowly, avoiding a vague doctrine of necessity and relying in

¹ League of Nations, Legal Questions (1930), vol. 5, p. 9. *American Journal of International Law*, 24 (1930), Suppl., p. 234 at p. 236; quoted by François, *Second Report on Régime of the High Seas* (1951); Doc. A/CN.4/42, pp. 44-45; *I.L.C. Yearbook* (1951-II), p. 75 at p. 92, para. 108.

² Examples: *Politische Verträge*, vol. 1, No. 104, pp. 128, 144, 167, 168.

³ *Treaty Series*, No. 58 (1939); *American Journal of International Law*, 35 (1941), Suppl., p. 173. See also *Documents on British Foreign Policy, 1919-1939*, Third Series, vol. 5, p. 47.

⁴ See also paragraph 2 of Article 2, which refers to a 'clear menace to the security' of a contracting party.

⁵ See *Documents on British Foreign Policy, 1919-1939*, Third Series, vol. 3, p. 288; (Hitler's Decree), *ibid.*, vol. 4, p. 368 (French Note); *ibid.*, p. 447 (Soviet Note); communication by Benes to the Secretary-General of the League of Nations, quoted in Langer, *Seizure of Territory, The Stimson Doctrine and Related Principles* (1947), p. 221; Chamberlain in the House of Commons, *Parliamentary Debates, H.C.*, 5th Ser., vol. 345, col. 887, 20 March 1939; Roosevelt to Benes, 27 March 1939, quoted in Langer, *op. cit.*, p. 233; United States Note to Switzerland, 24 November 1939, *Department of State Bulletin*, vol. 1, p. 645.

⁶ See Kaufmann, *Recueil des cours*, 54 (1935-IV), pp. 580-1. See also above, p. 196, n. 4, and p. 202, n. 1.

⁷ Descamps, *Recueil des cours*, 31 (1930-I), p. 485; Yepes and Da Silva, *Commentaire théorique et pratique du Pacte de la Société des Nations* . . . (1934), vol. 1, p. 298. See also Giraud, *Recueil des cours*, 49 (1934-III), pp. 747-87.

some cases on the formula used by Webster in the *Caroline* incident.¹ It is, however, the State practice and not the doctrines of jurists which fairly consistently supports the view that resort to force in collective or self-defence is a reaction to an actual or imminent resort to force in the years 1930-9.

V. THE RIGHT OF SELF-DEFENCE IN THE PERIOD AFTER THE SECOND WORLD WAR

The customary law. The question of the forcible protection of rights

In the writings of jurists and the practice of States the right of self-defence for a quarter of a century has been more often referred to than it has received careful definition. The increasing acceptance by States in the period between 1920 and 1939 of the view that war or any use of force as an instrument of national policy was unlawful has, it is submitted, resulted in the demise of the rights of self-help and of self-preservation. The right of self-preservation had always been capacious enough to justify action beyond what was necessary for the maintenance of the integrity of the territorial domain of the State. The legal developments of the period of the League had the result that, while the right of self-preservation no longer existed in its classical form, some of its content was preserved. This residual right was referred to as that of self-defence or legitimate defence. It was understood that this right of legitimate defence was subject to objective and legal determination and that it was confined to reaction to immediate danger to the physical integrity of the State itself. Attempts by Governments to reserve the right of determining the existence of a necessity for self-defence did not meet with success. Unfortunately, the acceptance of the existence of a right of self-defence which was essentially a legally defined right was not in fact accompanied by any precise definition of the content of the right.

It has been observed that in the period of the League of Nations the right of self-defence commonly appeared in the context of the use of force. It was essentially a reaction by a State against the use or threat of force by the armed forces of another State. The essence of such a right was proportionality to the threat offered and this would create a presumption that force was only lawful as a reaction against force.

Before more detailed examination of the content of the right of self-defence some occasions may be recalled on which in the period since 1945 authoritative opinions as to the content of the right have been given.

¹ De Brouckère, *Recueil des cours*, 50 (1934-IV), p. 33; Basdevant, *ibid.*, 58 (1936-IV), pp. 546-50; Brierly, *ibid.*, pp. 126-31; Accioly, *Traité*, vol. 1, pp. 461-2. See also the speech of Politis in the League Assembly, 7 December 1932; *League of Nations Official Journal*, Spec. Suppl., No. 111, pp. 44-45.

Justice Jackson, American Chief Prosecutor before the Nuremberg Tribunal, suggested that an 'aggressor' was that State which was the first to commit certain acts, such as invasion of the territory of another State, all of which involved the use of armed force.¹ He further suggested that 'exercise of the right of legitimate self-defence—that is to say, resistance to an act of aggression, or action to assist a State which has been subjected to aggression—shall not constitute a war of aggression.'²

The International Military Tribunal seems to have assumed in its Judgment that self-defence was justified in the situation in which a State is invaded or faced with an imminent danger of attack creating a necessity within the test propounded in the *Caroline* case;³ it did not expressly state that self-defence must always involve the use of force against force or threat thereof. In the Judgment of the International Military Tribunal for the Far East the right of self-defence was discussed in relation to the use of force.⁴ However, the defence had contended that Japanese military operations against France, the Netherlands, Great Britain and the United States were justifiable measures of self-defence because those Powers took economic measures against Japan and as a result she had to go to war to preserve the welfare and prosperity of her nationals.⁵ The Court did not accept this argument.⁶

Article 5 of the Treaty of Brotherhood and Alliance between Iraq and Transjordan signed on 14 April 1947⁷ contained a list of acts which were 'deemed acts of aggression' and which involved the use of force or a statement of an intention to resort to force immediately in the form of a declaration of war. Paragraph (c) of that article provided:

'The following shall not be deemed acts of aggression:

- (1) The exercise of the right of legitimate defence, i.e., resisting any act of aggression as defined above.
- (2) Actions taken to implement the provisions of the Charter of the United Nations.'

Article 3 of the Inter-American Treaty of Reciprocal Assistance of 1947⁸

¹ His definition is similar to the definitions of Politis and Litvinov, submitted to the General Commission of the Disarmament Conference in 1933; *Actes de la Conférence, Série B*, vol. 2, p. 236; *Documents . . .*, vol. 2, pp. 683-4.

² *Opening Speeches of the Chief Prosecutors*, H.M.S.O., p. 41. See also the American redraft of a definition of crimes proposed to the International Conference on Military Trials, 25 July 1945, *in fine*: 'Exercise of the right of legitimate self-defence, that is to say, resistance to armed invasion or attack, or action to assist a state which has been subjected to armed invasion or attack, shall not constitute a war of aggression' (*Jackson Report*, p. 374).

³ *Judgment*, Cmd. 6964, pp. 28-29.

⁴ *Judgment*, text produced by Far Eastern Commission, p. 31; *Annual Digest*, 1948, No. 118; p. 364.

⁵ See Horwitz, *International Conciliation*, No. 465 (1950), p. 530. Cf. *Dissentient Judgment of Justice Pal* (1953), 126-9.

⁶ *Judgment*, Sohn, *Cases and Materials on United Nations Law*, pp. 913-14.

⁷ *United Nations Treaty Series*, vol. 23, No. 345. In force 10 June 1947.

⁸ *American Journal of International Law*, 43 (1949), Suppl., p. 53.

provides for individual and collective self-defence in case of an 'armed attack'. Articles 18 and 25 of the Bogota Charter of 1948¹ are primarily concerned with reaction to the use of force, but the latter article refers ambiguously to 'an act of aggression that is not an armed attack' and is concerned only with the application of 'measures and procedures', whilst the former merely refers to 'the case of self-defence in accordance with existing treaties or in fulfilment thereof'.

In the Draft Declaration of the Rights and Duties of American States prepared by the Governing Board of the Pan-American Union in 1946,² paragraph XI refers to 'the exercise of the inherent right of self-defence against armed attack'. A Draft Charter submitted by the delegation to the General Assembly of Ecuador in 1947 similarly refers to 'the exercise of the inherent right of legitimate defence in case of armed attack'.³ A Panamanian Draft Declaration was submitted to United Nations Members in 1947; Article 17 of the Draft provided:⁴

'Every State has the inherent right of individual or collective legitimate defence, and in the exercise of this right, it may use force to counter the unauthorized use of force by another State, provided that it shall immediately advise the competent organ of the community of States.'

In its comment on the article the Danish Government proposed an addition as follows:⁵

'The exercise of the right of self-defence presupposes that an attack by some other State is imminent or has already been commenced, and it must not be used to any further extent than necessary to repel such an attack. To protect any rights which one State may have in the territory of another, the right of self-defence must not be exercised to any greater extent than is generally permitted by the national law of the latter State.'

At its 1st session in 1949 the International Law Commission adopted a Draft Declaration on Rights and Duties of States⁶ in which Article 12 provided that 'every State has the right of individual or collective self-defence against armed attack'.

The Report of the Commission states that the language is based upon that employed in Article 51 of the Charter of the United Nations. The discussions of the article by the Commission indicated differences of

¹ *American Journal of International Law*, 46 (1952), Suppl., p. 43.

² *Preparatory Study Concerning a Declaration of the Rights and Duties of States*, Memo. submitted by the Secretary-General, I.L.C., 1948, A/CN.4/2, p. 147.

³ *Ibid.*, p. 152, Article X.

⁴ *Ibid.*, p. 107.

⁵ *Ibid.*, pp. 107-8

⁶ *Report of I.L.C.*, 1st session, para. 46; *General Assembly Official Records*, 4th session, Suppl. No. 10 (A/925); *American Journal of International Law*, 44 (1950), Suppl., pp. 15, 18. In Resolution 375 (IV) of 6 December 1949 the General Assembly noted the draft and asked Governments for further comments: U.N. Documents A/P.V.270, 6 December 1949. The resolution stated that the draft was 'a notable and substantial contribution towards the progressive development of international law and its codification'. In Resolution 596 (VI) of 7 December 1951 the General Assembly postponed all consideration of the topic *sine die*.

opinion as to the legality of preventive action prior to an actual attack, but all the members regarded the right of self-defence as exercisable through the medium of armed force only in case of the threat of armed attack or actual attack, i.e. as a reaction to the use of force.¹

In the course of the discussion on the question of defining aggression in the Sixth Committee of the General Assembly and in the Special Committees of 1953 and 1956 on that subject, the great majority of the representatives have assumed that the right of self-defence involves a riposte to the use of force and that forcible action cannot be a lawful reaction to subversion or 'economic aggression'.² Only occasionally did a representative consider that self-defence had wider application.³ However, it is to be admitted that for representatives of Members of the United Nations Article 51 of the Charter has an inhibiting effect on interpretations of the right of self-defence, and that in any case the argument from silence has limitations.

Nevertheless, it is submitted that in State practice both before and after the Second World War resort to force by virtue of the right of self-defence is almost without exception associated with the idea of reaction against the use of force.⁴ The concept of aggression appeared as the right of self-preservation fell into disrepute, and in the period of the League and the Second World War 'aggression' was synonymous with an armed attack, the unlawful use of force, which justified action in self-defence. To assert that the right of self-defence justifies action in the face of other threats to the interests of States is to revert to the vague and obsolete right of self-preservation or the doctrine of self-help. The British Government justified the military operations against Egypt in 1956, *inter alia*, by the argument that self-defence comprehends the protection of nationals.⁵ It can hardly be possible to select particular parts of the old doctrines of necessity, self-

¹ *I.L.C. Yearbook* (1949); *Summary Records* (1956), pp. 108-11, 145-7.

² See, in particular, Report of the 1956 Special Committee, *General Assembly, Official Records*, 12th session, Suppl. No. 16 (A/3574), paras. 203-9 (Röling proposal). Generally: *General Assembly, Official Records*, 6th session, Sixth Committee 278th-295th meetings; 7th session, 329th-347th meetings; 9th session, 403rd-420th meetings; 12th session, 514th-528th and 530th-538th meetings; Report of the Special Committee on the Question of Defining Aggression, *ibid.*, 9th session, Suppl. No. 11 (A/2638).

³ Cf. Röling, Sixth Committee, *ibid.*, 6th session, 289th meeting, para. 39; Röling, Report of the Special Committee . . . 1953, *ibid.*, 9th session, Suppl. No. 11 (A/2638) para. 86 *in fine* (permitting preparation of attack against another State by armed groups on State territory). Expressions in clear terms of opinion that the right of self-defence applied only in case of an armed attack and not in case of indirect or economic aggression: Adamiyat (Iran), Sixth Committee, *ibid.*, 9th session, 405th meeting, para. 9; Castañeda (Mexico), 408th meeting, para. 30; 415th meeting, para. 45; Mufti (Syria), 12th session, 517th meeting, paras. 5, 20; Holmback (Sweden) 518th meeting, para. 3; Geamanu (Roumania), 520th Meeting, para. 36.

⁴ See Castren, *The Present Law of War and Neutrality* (1954), p. 53; Redslob, *Traité* (1950), p. 243; Zourek, *Recueil des cours*, 92 (1957-II), pp. 817-28; Calogeropoulos-Stratis, *Revue hellénique de droit international*, 6 (1953), pp. 220, 224.

⁵ Prime Minister and Foreign Secretary on 30 October, *Parliamentary Debates H.C.*, 5th Ser., vol. 558, cols. 1277, 1377; Foreign Secretary on 31 October, *ibid.*, cols. 1566-7; Lord Chancellor on 1 November, *ibid.*, *H.L.*, vol. 199, cols. 1353 et seq.

preservation or intervention and attach them to a category of self-defence which has evolved in the context of considerable changes in the attitude of the law towards the use of force. It can be argued that the customary law still permits certain grounds of intervention, e.g. the protection of nationals, but self-defence now has a more restricted and obvious meaning. For at least thirty years it has appeared in State practice principally as a reaction to the use of force against the territorial domain, the physical entity, of a State.¹ It is not very surprising that the draftsmen of the United Nations Charter should define it in Article 51 by reference to the occurrence of an 'armed attack'.

To link self-defence with a 'right of self-protection' is no longer admissible since, if this is done, the distinction between the right of self-protection, including, for example, the landing of forces to protect nationals and their property, and the right of self-help, becomes obscure, although the former is the more limited concept.² Such a 'right of self-protection' involves forcible protection of rights and the forcible protection of rights is in effect one of the wider aspects of self-help. It is considered that the State practice, quite apart from the League Covenant and United Nations Charter, has established the illegality of self-help. Why else the reiterated obligation to settle disputes peacefully?

The argument that in customary law the right of self-defence still comprehends the forcible protection of rights receives some apparent support from two sources. In the first place the Judgment in the *Corfu Channel* case (*Merits*)³ may be interpreted as permitting the forcible exercise of legal rights. The Court referred to the passage of four British warships on 22 October 1946 as 'designed to affirm a right which had been unjustly denied'. It observed further⁴ that the Government of the United Kingdom 'was not bound to abstain from exercising its right of passage'. Later in the Judgment the following passage occurs:⁵

'The intention must have been, not only to test Albania's attitude, but at the same time to demonstrate such force that she would abstain from firing again on passing

¹ See above, pp. 201-19. The reference here is to the *use of force* alleged to be in self-defence. The category of 'self-defence' may apply to precautions taken on State territory, e.g. security measures and immigration control, or which are not forcible, e.g. jamming of radio propaganda, in face of subversion of various kinds.

² The distinction is made by Waldock, *Recueil des cours*, 81 (1952-II), p. 455 at pp. 461-4, 466-7, 503. See also Bowett, *Self-defence in International Law*, pp. 29 et seq., 270-1 at p. 270: 'The function of the right of self-defence is to justify action, otherwise illegal, which is necessary to protect certain essential rights of the State against violation by other States.' The rights concerned are: the right of territorial integrity, the right of political independence, the right of protection over nationals and certain economic rights. Cf. Rousseau, *Recueil des cours*, 93 (1958-I), p. 540.

³ *I.C.J. Reports*, 1949, p. 4.

⁴ *Ibid.*, p. 30. See the interesting discussion by Wilhelm, *Annuaire suisse de droit international*, 15 (1958), p. 93; the general study by Il Yung Chung, *Legal Problems Involved in the Corfu Channel Incident* (1959); and Jiménez de Aréchaga, *Derecho constitucional de las Naciones Unidas* (1958), pp. 89-94.

⁵ p. 31.

ships. Having regard, however, to all the circumstances of the case, as described above, the Court is unable to characterize these measures taken by the United Kingdom authorities as a violation of Albania's sovereignty.'

If this is in fact an acceptance of the legality of self-help it stands in contrast to the legal developments of a quarter of a century. There had for six months been a dispute which in its legal aspects concerned the right of warships to pass through that part of an international strait which was also a part of the territorial waters of a State in a state of war with its neighbour, Greece. The law was not particularly well settled¹ and the United Kingdom had not sought to use available means of peaceful settlement. When the 'exercise of the right of passage' occurred the rights concerned were putative.² It is legitimate to point out that it is very probable that the Judgment cannot be a source for any propositions of general application concerning the legality of certain acts by States. The Court was concerned with problems of delictual liability, *inter alia*, whether the United Kingdom was under any duty to give satisfaction to Albania by reason of the acts of the Royal Navy on 22 October. In coming to a decision the Court made an overall assessment of the legality of the passage and decided that, having regard to all the circumstances of the case, the general character of the passage was innocent.³ It is hardly justifiable to argue that, because the Court refused to permit certain aspects of the British action to prejudice its view of the general character of the passage as innocent, it therefore sanctioned the legality of all action with such aspects. It may be observed that but for the terms of the *compromis* the Court might have held Albania responsible in spite of any illegality of the British action on 22 October on the ground that the means used—the mines laid and the absence of warning—was unlawful.⁴ However, the fact remains that certain passages in the Judgment regarded in isolation might be held to warrant the view that the exercise of rights which have been unjustly denied is lawful.⁵

¹ Even when and after the Court delivered its Judgment there were some opinions to the contrary: Krylov, *The International Court of the United Nations Organization (Problems of International Law and Decisions in its practice during the ten years 1947-57)* (in Russian) (1958), p. 96; and his Dissenting Opinion, *I.C.J. Reports*, 1949, p. 74; Dissenting Opinion of Azevedo, *ibid.*, pp. 103-9. Cf. Gross, *American Journal of International Law*, 53 (1959), pp. 581 et seq.; Fitzmaurice, *International and Comparative Law Quarterly*, 8 (1959), pp. 100-1. See also the Judgment at p. 29 where the Court recognizes a right to make regulations in respect of the passage of warships at times of tension.

² See the Dissenting Opinion of Azevedo, *I.C.J. Reports*, 1949, pp. 108-9.

³ Cf. Fitzmaurice, *this Year Book*, 27 (1950), pp. 30-31; and Il Yung Chung, *op. cit.*, p. 247. See the Judgment at p. 31.

⁴ The territorial sovereign cannot enjoy complete freedom of action in regard to trespassers. Cf. the Judgment at p. 22, referring to 'elementary considerations of humanity, even more exacting in peace than in war'. See also Khoshkish, *The Right of Innocent Passage* (1954), pp. 135-6. It is tempting to regard this aspect as the (almost) inarticulate major premiss of the majority Judgment.

⁵ See Waldock, *Recueil des cours*, 81 (1952-II), pp. 499, 502-3; Fitzmaurice, *ibid.*, 92 (1957-II), p. 171; Gadus Callarias, *The Icelandic Dispute in Perspective*, pp. 5-6; Schwarzen-

Apparent support for the legality of the forcible protection of rights may also be drawn from the law relating to 'self-defence on the high seas' since this comprehends various rights of forcible action other than in the form of riposte to the use of force.¹ This question is examined below and the conclusion reached that the rights of action concerned are not in every case referable to a doctrine of self-defence but must be referred to specific rules of the customary law. To take any other view of the law relating to the high seas is to become involved in a *non sequitur* and to admit that a right of self-preservation still exists.

The forcible protection of rights, 'essential' or otherwise, cannot be regarded as a legitimate form of self-defence in the customary law as it exists at present.² The argument to the contrary has the result of making the content of self-defence both vague and extensive; it also involves in substance a return to the old doctrines of necessity and self-preservation.

The right of anticipatory self-defence in the customary law

It is generally assumed that the customary law of the nineteenth century permitted anticipatory action in face of imminent danger.³ There can be little doubt that the right of self-preservation and the doctrine of necessity comprehended anticipatory action. *The Caroline* doctrine permitted preventive action in a context in which self-defence was equated with self-preservation.⁴ In many works preventive action is regarded as an aspect of self-preservation.⁵ In defining the right of self-preservation, which he regarded as that of self-defence, Westlake stated:⁶

'A State may defend itself, by preventive means if in its conscientious judgment necessary, against attack by another State, threat of attack, or preparations or other conduct from which an intention to attack may reasonably be apprehended.'

berger, *Recueil des cours*, 87 (1955—I), p. 339; id., *International Law Association, New York University Conference, 1958, Committee on the Charter of the United Nations, Report on Some Aspects of the Principle of Self-Defence* . . . , p. 22. See the criticism of such conclusions by McDougal and Feliciano, *Yale Law Journal*, 68 (1958-9), pp. 1138-9.

¹ Cf. Waldock, loc. cit., p. 464.

² See below, pp. 246-7. Cf. Brierly, *Recueil des cours*, 58 (1936—IV), pp. 126-9; Basdevant, *ibid.*, pp. 546-7.

³ Bowett, op. cit., pp. 31, 58, 256, 269; Waldock, loc. cit., p. 463; Wright, *American Journal of International Law*, 51 (1957), pp. 270, 271; Jessup, *A Modern Law of Nations* (1956), p. 166; Stone, *Legal Controls of International Conflict*, p. 244; Green, *Archiv des Völkerrechts*, 6 (1957), p. 433; Redslob, *Traité* (1950), pp. 243, 244; De Brouckère, *Recueil des cours*, 50 (1934—IV), p. 33. Those writers who formulate the right of self-defence in terms of Webster's statement in the *Caroline* case necessarily confer a right of anticipatory action.

⁴ Above, pp. 184-6. The principle is discussed under the rubric 'Self-Preservation' in Oppenheim, op. cit., vol. 1, pp. 297 et seq.

⁵ See Stowell, *Intervention* (1921), pp. 355 et seq.; Baty, *The Canons of International Law* (1930), p. 96; Lawrence, *Principles of International Law* (1930), p. 125; Fiore, *Nouveau droit international public* (1885), vol. 1, paras. 454 et seq. See also Weiden, *Transactions of the Grotius Society*, 24 (1938), pp. 122-5.

⁶ *International Law* (1904), vol. 1, p. 299. See also Hall, *International Law* (8th ed.), p. 51.

Anticipatory action was taken and stated to be the exercise of the right of self-defence on several occasions against armed bands operating from neighbouring territory¹ or proceeding by sea towards the acting State although still outside territorial waters.² Preventive action in case of actual and imminent breaches of neutrality has been lawful until very recently and is still lawful in the opinion of a substantial number of jurists.³

Defence counsel argued before the Nuremberg Tribunal that the German attack on the Soviet Union had merely anticipated a Soviet attack.⁴ The Tribunal would seem to have implicitly accepted the legality of anticipatory action since it dismissed this argument in relation to the facts:⁵

'It was contended for the defendants that the attack upon the U.S.S.R. was justified because the Soviet Union was contemplating an attack upon Germany, and making preparations to that end. It is impossible to believe that this view was ever honestly entertained.'

The International Military Tribunal for the Far East considered a similar argument. The Netherlands had declared war on Japan on 8 December 1941, before any attack had occurred against the Netherlands East Indies. However, Japan had laid plans to attack the Netherlands East Indies on that date and the Tribunal rejected the view that the Netherlands action was unlawful:⁶

'The fact that the Netherlands, being fully apprised of the imminence of the attack, in self-defence declared war on the 8th December and thus officially recognised the existence of a state of war which had been begun by Japan cannot change that war from a war of aggression on the part of Japan into something other than that.'

It must be noticed, however, that the Tribunal was primarily concerned with the characterization of *Japanese* actions: in the circumstances they were criminal even if the Netherlands had acted unlawfully.

Some reservations on the customary law in respect of anticipatory self-defence

The customary rule permitting anticipatory action must be treated with caution. Statements of the rule all too often appear in a context, whether it be the *Caroline* case or works of authority, in which no clear distinction

¹ The Soviet Union in Outer Mongolia (1921) and Manchuria (1929), and France in Tunisia (1958): see Brownlie, *International and Comparative Law Quarterly*, 7 (1958), pp. 732-3. Cf. *ibid.*, pp. 733-4 on an alleged right of hot pursuit.

² See below, pp. 252-3.

³ Below, p. 267, n. 3. It is usually regarded as a special right of intervention.

⁴ *Trial of Major German War Criminals*, H.M.S.O., Part 18, p. 160 (Horn); Part 19, pp. 134-5 (Exner).

⁵ *Judgment*, Cmd. 6964, p. 35; and see pp. 28-30.

⁶ Horwitz, *International Conciliation* (1950), p. 560. See also Sixth Committee, *General Assembly, Official Records*, 9th session, 410th meeting, para. 43; 411th meeting, para. 15 (Abushkevich asserts that the Netherlands action was collective self-defence); 415th meeting, para. 42 (similar view of Castañeda).

was made between self-preservation, necessity and self-defence. It is considered that the right of self-defence in the customary law should be evaluated in relation to the State practice of the recent past in addition to that of the period of the 'classical law'. There is little positive support for preventive self-defence in the practice of the period 1920-39 except in relation to the alleged right of pursuing armed bands.¹ Moreover, several treaties concluded in this period denied any right of anticipatory action, in particular, the Conventions for the Definition of Aggression of 1933,² the Pact of the Balkan Entente,³ and the Saadabad Pact of 1937.⁴ Perhaps significant is the general absence of any terms in treaties of mutual assistance which indicate that apprehended attack or imminent danger was a *casus foederis*,⁵ although there might be provision for consultation in such situations.

As matter of principle and policy, anticipatory self-defence is open to certain objections. It involves a determination of the certainty of attack which is extremely difficult to make and necessitates an attempt to ascertain the intention of a government. This process may lead to a serious conflict if there is a mistaken assessment of a situation. Furthermore, even if a State is preparing an attack it still has a *locus poenitentiae* prior to launching its forces against the territory of the intended victim. Nor is the State which considers itself to be the object of military preparations forced to remain supine but may take all necessary precautions short of commencing an attack: it may also appeal to the competent organs of the United Nations or of a regional defence organization, and by doing so will at the very least embarrass the prospective aggressor by advertising the facts of the situation.

Another consideration which is usually ignored is the effect of the proportionality rule on the present problem. It is possible that in a very limited number of situations force might be a reaction proportionate to the danger where there is unequivocal evidence of an intention to launch a devastating attack almost immediately. However, in the great majority of cases to commit a State to an actual conflict when there is only circumstantial evidence of impending attack would be to act in a manner which disregarded the requirement of proportionality.

To permit anticipatory action may well be to accept a right which is wider than that of self-defence and akin to that of self-preservation. It is true that States must be accorded the right to decide on defensive necessity in the first instance, but in making this *ex parte* decision they should be

¹ Other exceptional cases in provisions of treaties: The Locarno Treaty, Article 2, above, p. 204; the Agreement of Mutual Assistance between Poland and Great Britain, 1939, Article 2, above, p. 218; Agreement between France and Poland, 1 September 1939, Article 1; *Revue de droit international* (La Pradelle) (1940), p. 373. Cf. Redslob, *Traité*, p. 245, n. 2.

² Above, pp. 216-17.

³ Above, p. 217, n. 1.

⁴ Above, p. 217, n. 3.

⁵ *Politische Verträge*, vols. 1, 2 and 3, *passim*.

inhibited by a rule which is related to facts which have objective characteristics and not to mere estimates of intention. It is interesting to notice that Verdross has classified anticipatory acts as 'acts of self-protection other than legitimate defence'.¹

The particular fault of the customary rule is that it provides no clear guidance as to the very rare cases in which anticipatory acts of force may be justified:² even the formula in the *Caroline* case is primarily verbal. Objection is taken to the present lack of a clear formulation of the rule and an attempt is made below to recast it in more acceptable form.³

It must be realized that, under the influence of the terms of Article 51 of the Charter and a dislike of providing legal excuses for preventive war, the right to take anticipatory measures on foreign territory has been under general attack recently and the discussions of the Sixth Committee of the General Assembly contain sharp clashes of opinion on the question.⁴ In conclusion, it is a very significant, though not of course ultimately decisive fact, that on occasions in recent years on which States have accused their neighbours of planning an attack, no right of anticipatory action has been asserted. Thus in September 1955 Ecuador accused Peru of massing 20,000–30,000 troops on the frontier between the two States and requested action by the Organization of American States: the latter dispatched a commission of investigation.⁵ In October 1957 Syria charged Turkey with preparing an attack and requested that the matter be placed on the agenda of the General Assembly.⁶ Again, in a letter of 3 December 1958, Cambodia informed the Security Council that 'troops on a war footing and large amounts of military equipment' were being concentrated on the frontier by the Siamese Government.⁷ No suggestion of preventive action was made in these cases.

With the possible exception of Netherlands action against Japan in 1941 modern practice contains few instances of anticipatory action in self-defence apart from action taken in respect of anticipated breaches of neutrality, a part of the law which has special characteristics and which is insufficiently developed.⁸

¹ *Recueil des cours*, 30 (1929—V), p. 485.

² Below, pp. 258–9, 262–3.

³ Below, p. 258.

⁴ For views expressed in general terms and not with specific reference to Article 51 of the Charter, see Sixth Committee, *General Assembly, Official Records*, 6th session, 284th meeting, para. 3; 287th meeting, paras. 27, 28; 288th meeting, para. 34; 290th meeting, paras. 57, 65; 292nd meeting, para. 24; *ibid.*, 7th session, 331st meeting, para. 31; 341st meeting, para. 14 (and *errata*); Report of the Special Committee on the Question of Defining Aggression, 1953, *ibid.*, 9th session, Suppl. No. 11 (A/2638), paras. 35, 60 et seq.; Report of the 1956 Special Committee, *ibid.*, 12th session, Suppl. No. 16 (A/3574), paras. 70–73.

⁵ *The Times*, 10 September 1955.

⁶ *Ibid.*, 17 October 1957. A Syrian statement referred to 'an actual military threat to Syria'. See also *General Assembly, Official Records*, 12th session, plenary meetings, 22 October 1957; and letter from Soviet delegation to the President of the General Assembly, 16 October; *Soviet News*, No. 3713, 18 October 1957.

⁷ *The Times*, 4 December 1958.

⁸ See below, pp. 267–8.

The proportionality rule

The customary right of self-defence involved the assumption that the force used must be proportionate to the threat. The formula used by Webster in relation to the *Caroline* incident has attracted writers by virtue of his insistence that self-defence must involve 'nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it'. The Webster correspondence in reality merely stated a right of self-defence which had a more limited application than the vague right of self-preservation and the broad and political concept of self-defence found in nineteenth-century thought and practice. A legal concept of self-defence comprehends proportionality¹ and the emphasis on proportionality as a 'special requirement' in the Law of Nations may represent an attempt to create the necessary distinction between defence and self-help in reaction to an historical tendency to confuse them.

Proportionality as a problem has received little attention from jurists and, apart from the Webster formula, it was not until the period of the League that it was mentioned with any frequency.² The report by De Brouckère in 1927 contains the statement:³

'Legitimate defence implies the adoption of measures proportionate to the seriousness of the attack and justified by the seriousness of the danger.'

The dearth of discussion of proportionality is surprising since the verbal formulas expressing the requirement in Webster's Note and elsewhere leave many problems unsolved. In the incident concerning the *Caroline* the United States Government disagreed with the British Government as to the proportionality of the British reaction to the danger.⁴ It is arguable that anticipatory action is in general contrary to the principle under discussion. Further, in relation to the protection of the lives and property of nationals in foreign States the British Government has taken the view that the use of force with this purpose satisfied the requirements laid down by Webster,⁵

¹ Cf. Street, *The Law of Torts* (2nd ed.), p. 76; Russell on *Crime* (11th ed.), p. 497; Archbold, *Criminal Pleading, Evidence and Practice* (34th ed.), p. 1012; Michael and Wechsler, *Criminal Law*, pp. 36-38; Perkins on *Criminal Law*, p. 883; Digest, 9.2.45: 4.

² De Brouckère, *Recueil des cours*, 50 (1934-IV), p. 33; Briery, *ibid.*, 58 (1936-IV), p. 129; Basdevant, *ibid.*, pp. 549-50; Uden, *Revue de droit international et de législation comparée*, 12 (1931), p. 266; Accioly, *Traité*, vol. 1, p. 462.

³ Reports and Resolutions on the subject of Article 16 of the Covenant, League of Nations Doc. A.14 (1927); Legal Questions (1927), v, 14, pp. 60, 69.

⁴ In the enclosure in the Note of 27 July 1842, Webster after stating the classical formula on self-defence and the circumstances of the British action, for example, the fact that the vessel was set on fire and sent over the falls, concludes: 'A necessity for all this, the Government of the United States cannot believe to have existed.' See *British and Foreign State Papers*, vol. 30, p. 193; *American Journal of International Law*, 32 (1938), p. 89.

⁵ In relation to the Suez operation, see above, p. 222, n. 5, especially the statement of the Lord Chancellor on 1 November 1956.

and this view is supported by some jurists.¹ Dr. Bowett advances the view that the use of force is lawful as an exercise of the right of self-defence in case of threats to the political independence of a State constituted by subversion or economic measures,² and the fact that such views of the law are expressed indicates the controversial aspects of proportionality.

Another problem which requires examination concerns the lawfulness of the use of nuclear weapons against an attack by conventional weapons.³ It would be possible to argue that provided the capacity is only that which is required to meet an attack, nuclear weapons could be used against a conventional attack, i.e. an armoured drive could be met by a localized use of nuclear devices; and an all-out conventional aggressive war could be met with paralysing blows from megaton weapons.⁴ It is submitted that this position, though apparently quite logical, has serious flaws. First, the nuclear weapon is qualitatively different from the conventional weapon in its destructive capacity, effects on the population both at the time of the attack and for the future, and effects on the atmosphere of other States. Secondly, once used, the effect of delivering megaton weapons in intercontinental ballistic missiles is so devastating and immediate that there is little time or scope for mediation or negotiation before the State faced with the nuclear attack retaliates with its nuclear weapons. Thirdly, the functional defect in the proportionality doctrine, to be noticed shortly, has particular dangers in relation to nuclear weapons. Mr. Nagendra Singh has suggested that the use of nuclear weapons against an aggressor should be permitted only when conventional weapons have clearly failed to check his forces.⁵ This is a more reasonable view

¹ Waldock, *Recueil des cours*, 81 (1952—II), pp. 466–7; Bowett, *Self-defence in International Law*, p. 98.

² *Ibid.*, pp. 54, 113. He specifies that only in exceptional circumstances will force be a lawful reaction to such threats.

³ It is thought that this distinction is useful and valid in spite of the development of small nuclear 'devices' which have a destructive power comparable with that of modest conventional weapons. Some jurists hold the view that the use of nuclear weapons is illegal: see Schwarzenberger, *The Legality of Nuclear Weapons* (1958), p. 3; *Contribution to the Study of the Problems of Disarmament*, International Association of Democratic Lawyers (Brussels, 1958), pp. 5, 21, 38–39, 46–50, 60–65; Nagendra Singh, *Nuclear Weapons and International Law* (1959). This question is reserved in the present discussion. As a matter of State practice the United States, Great Britain and U.S.S.R. seem to be prepared to use nuclear weapons in certain contingencies: see *Manual of Military Law of the United Kingdom*, Part III; *The Law of War on Land* (1958), paras. 107, 113; *U.S. Naval Instructions* (1955), Article 613; *U.S. Army Field Manual* (1956); *The Law of Land Warfare*, § 35. And see the Resolution on Prohibition of the Use of Nuclear Weapons for War Purposes, adopted by the General Assembly on 24 November 1961, by fifty-five votes to twenty, with twenty-six abstentions.

⁴ Some of the problems of military tactics and political morality involved are revealed by a perusal of Kissinger, *Nuclear Weapons and Foreign Policy* (1957); Blackett, *Atomic Weapons and East-West Relations* (1956); and, in the *New Statesman*, 17 May 1958, p. 625; Crossman, *ibid.*, 14 September 1957, p. 306 (review of Kissinger).

⁵ *Indian Year Book of International Affairs* (1956), p. 3 at pp. 32–34. See also the same writer, *Nuclear Weapons and International Law* (1959), pp. 132–6. See the statement of the U.S. Deputy Secretary of Defence, Mr. Roswell Gilpatric, 6 June 1961, *The Times*, 7 June 1961.

than one which would permit their use *ab initio* but ultimately it meets the same difficulties.

State practice existing on this question is not unequivocal but indicates that the Governments of the United States, France, Canada and the United Kingdom regard the use of nuclear weapons as permissible against an aggressor State irrespective of the weapons employed by the latter. Thus the drafts supported by those Governments at the meetings of the Subcommittee of the United Nations Disarmament Commission provided for prohibition of the use of nuclear weapons 'except in defence against aggression'.¹ The Soviet delegation proposed that the use of such weapons in defence against aggression should be permitted when a decision to that effect had been taken by the Security Council.² It is significant that on the problem of defining 'aggression' in the drafts under discussion Mr. Lloyd observed:³

'... I think it is much better to adhere in our memorandum to the term "aggression", because I think there can be no doubt at all that no Government would undertake the responsibility of using weapons of the type to which we are referring unless there was a clear, glaring case of the kind of aggression to which the retention of these weapons is still in some measure a deterrent.'

When Mr. Warbey asked the Minister of Defence to what extent it was the policy of the Government 'to use nuclear weapons, of any or all types, in reply to an act of aggression committed with conventional arms', the Minister in a written answer stated that 'it would be wrong to define publicly in advance the circumstances in which these weapons would be used'.⁴

It remains to comment on the element of danger in the doctrine of proportionality.⁵ If a State is faced with a small-scale attack across its frontier at a time of tension, in circumstances which do not clearly indicate whether the attack is the result of a mistake or unauthorized act of a subordinate officer, or is the herald of an offensive, its reaction might be proportionate to the threat even if it were slightly more forceful than the actual attack, the extra force being a guarantee of decisiveness. If the putative aggressor counter-attacked in fear of a genuine aggressive move by the

¹ Cmd. 9204, *United Nations*, No. 2 (1954), para. 23; Cmd. 9205, *ibid.*, No. 3 (1954), pp. 231 et seq.; Cmd. 9636, *ibid.*, No. 2 (1955), paras. 28, 29; App. I, Annex 4, para. 1 (Canada, France, U.S. and U.K., Joint draft resolution); Cmd. 9648, *United Nations*, No. 1 (1956), pp. 25-26; Cmd. 9649, *ibid.*, No. 2 (1956), pp. 268-9, 309, 310, 312-13. See also *Parliamentary Debates, H.C.*, vol. 548, col. 2350, 15 February 1956; *International and Comparative Law Quarterly*, 5 (1956), pp. 439-41.

² Cmd. 9636 of 1955; App. I, Annex 15 (para. 5 at p. 38).

³ Cmd. 9205 of 1954, p. 264. See also Defence Outline of Future Policy, Cmd. 124. Presented by the Minister of Defence to Parliament, April 1957, para. 14 (p. 3): '... pending international agreement, the only existing safeguard against major aggression is the power to threaten retaliation with nuclear weapons.' And compare Report on Defence, Cmd. 363 of 1958, para. 38.

⁴ *Parliamentary Debates, H.C.*, vol. 579 (written answers), col. 103, 9 December 1957.

⁵ Cf. Tucker, *The Just War, A Study in Contemporary American Doctrine* (1960), pp. 128-30.

State which regarded itself as the victim of an attack, the situation could develop into a major conflict if each State relied on the 'guarantee of decisiveness' in riposte. Such a situation can only be prevented by having a call to withdraw behind frontiers or *de facto* frontiers by an international organ, and possibly some machinery either always available or created *ad hoc* to supervise a phased withdrawal. If both parties ignored an authoritative order or request to withdraw they might both be considered to this extent unlawful belligerents.

VI. THE RIGHT OF SELF-DEFENCE UNDER THE CHARTER OF THE UNITED NATIONS

Article 2 of the United Nations Charter provides:

'The Organization and its Members, in pursuit of the purposes stated in Article 1, shall act in accordance with the following principles. . . .

'3. All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

'4. All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.'

And Article 51 provides:

'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.'

It is necessary to determine the meaning of these provisions in the context of the Charter and their relation to the customary law regarding self-defence and the use of force. There is a general assumption by jurists that the Charter prohibited self-help and armed reprisals.¹ The combined

¹ Jessup, *A Modern Law of Nations* (1956), p. 172; Goodrich and Hambro, *Charter of the United Nations* (2nd ed.), p. 104; Briggs, *The Law of Nations* (2nd ed.), p. 964; Kelsen, *The Law of the United Nations*, p. 269; Oppenheim, *International Law* (7th ed.), vol. 2, pp. 153-4; Wright, *American Journal of International Law*, 47 (1953), p. 370, and *ibid.* 51 (1957), p. 272; Kunz, *ibid.*, 45 (1951), p. 533; Judge Alvarez, Individual Opinion, *Corfu Channel case (Merits)*, *I.C.J. Reports*, 1949, p. 42; Judge Krylov, Dissenting Opinion, *ibid.*, pp. 76-77; Judge Azevedo, Dissenting Opinion, *ibid.*, pp. 108, 112; Alfaro, *Revue de droit international* (Sottile), 29 (1951), p. 374; Scelle, *Revue générale de droit international public*, 58 (1954), p. 5. Lauterpacht has made the following guarded statement: 'There is in general international law no absolute prohibition of intervention; traditional international law permits intervention in a number of cases. It is possible—and perhaps probable—that inasmuch as intervention takes the form of physical force it is, by virtue of Article 2 (4) of the Charter of the United Nations, no longer open to its members': *The Development of International Law by the International Court* (1958), p. 317; and cf. *ibid.*, p. 90.

effect of paragraph 4 of Article 2 and Article 51 is represented as rendering all use of force illegal except in the exercise of the right of self-defence 'if an armed attack occurs'. This view has been challenged by some Governments and by certain jurists. The British Government did not accept the view that the military operations against Egypt, which it explained primarily as action for the protection of British nationals, were a violation of the Charter: the British argument was that the Charter—and in particular Article 51—did not restrict the customary right of self-defence and that the customary right included action to protect nationals provided the tests of exigency laid down in the *Caroline* case were satisfied.¹ Some jurists have relied on the phrase 'territorial integrity or political independence' in paragraph 4 of Article 2, asserting that it has a restrictive meaning, or on the last part of the paragraph 'or in any other manner inconsistent with the Purposes of the United Nations', in the course of justifying various forcible measures to protect interests and, especially, the lives and property of nationals.²

'Against the territorial integrity or political independence of any State'

It may be argued that these words in paragraph 4 of Article 2 must have some substance and that the use of force which is not accompanied by an intent to violate territorial integrity or political independence is not contrary to the obligations of Article 2.³ To support the British argument in the *Corfu Channel* case (*Merits*) that 'Operation Retail' was not in violation of paragraph 4 the United Kingdom agent, Sir Eric Beckett, stated that the action on 12 and 13 November 'threatened neither the territorial integrity nor the political independence of Albania. Albania suffered thereby neither territorial loss nor any part of its political independence.'⁴

In Chapter II of the Dumbarton Oaks Proposals the fourth principle provided simply:⁵

'All members of the Organization shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the Organization.'

¹ Lord Kilmuir, *Parliamentary Debates, H.L.*, vol. 199, cols. 1353-6, 1359, 1 November 1956; Selwyn Lloyd, *ibid.*, *H.C.*, vol. 558, cols. 1566-7, 31 October 1956. Cf. Waldock, *Recueil des cours*, 81 (1952-II), pp. 496-7.

² Bowett, *Self-defence in International Law*, pp. 12-13, 152, 186; Stone, *Aggression and World Order* (1958), pp. 43, 95-96; Colbert, *Retaliation in International Law*, pp. 202-3; Goodhart, *Recueil des cours*, 79 (1951-II), p. 202. See also: *Contra*: Verdross, *Recueil des cours* (1953-II), p. 14; Wehberg, *ibid.*, 78 (1951-I), p. 72; *Report of the Secretary-General on Questions of Defining Aggression* (A/2211), p. 23; Kelsen, *Principles of International Law* (1952), p. 45; Oppenheim, *op. cit.*, vol. 2, p. 154; McDougal and Feliciano, *Yale Law Journal*, 68 (1958-9), pp. 1100-1.

³ Bowett, *op. cit.*, pp. 152, 186.

⁴ *I.C.J. Pleadings, Corfu Channel case*, vol. 3, pp. 295-6. The Judgment does not encourage such lines of thought: *I.C.J. Reports*, 1949, p. 35.

⁵ Goodrich and Hambro, *op. cit.*, p. 573.

At San Francisco an Australian amendment introduced phraseology substantially identical with the final text of paragraph 4.¹ A Brazilian amendment would have provided:²

'All members of the Organization shall refrain in their international relations from any intervention in the foreign or domestic affairs of any other member of the Organization, and from resorting to threats or use of force, if they are not in accord with the methods and decisions of the Organization. In the prohibition against intervention there shall be understood to be included any interference that threatens the national security of another member of the Organization, directly or indirectly threatens its territorial integrity, or involves the exercise of any excessively foreign influences on its destinies.'

Ecuador wished to add a paragraph to Chapter II in these terms:³

'The declaration that an attempt by a State against the territorial integrity or inviolability, against the sovereignty or political independence of another State, shall be considered as an act of aggression against all the States which constitute the International Community.'

In the First Committee of Commission I several delegates referred to the necessity of incorporating in Chapter II an express undertaking that the world Organization should ensure the territorial integrity and political independence of Member States.⁴ The Committee rejected the Brazilian amendment but adopted the Australian amendment which had been accepted by the drafting subcommittee.⁵ In the discussion the Norwegian delegate expressed an opinion that 'it should be made clear in the Report to the Commission that this paragraph 4 did not contemplate any use of force, outside of action by the Organization, going beyond individual or collective self-defence. He was himself in favour of omitting the specific phrase relating to territorial integrity and political independence' since this was, on the one hand, a permanent obligation under international law and, on the other hand, could be said to be covered by the phrase 'sovereign equality', as suggested in the commentary by the rapporteur.⁶ There is no indication in the records that the phrase was intended to have a restrictive effect.⁷

In the Commission, Belaunde of Peru pointed out that paragraph one of Chapter II lacked any reference to the idea of personality but that the elements of personality had been incidentally inserted in paragraph 4 and that this did not establish absolute respect for sovereignty and territorial

¹ *U.N.C.I.O. Documents*, vol. 6, p. 557; *ibid.*, vol. 3, p. 543.

² *Ibid.*, vol. 6, p. 558. See also amendments of Costa Rica and Czechoslovakia, *ibid.*, p. 560. See also *ibid.*, vol. 3, pp. 233, 237 (Brazilian Comment on the Dumbarton Oaks Proposals); *ibid.*, vol. 3, p. 554 (Iranian amendment); *ibid.*, p. 467 (Observations of Czechoslovak Government).

³ *Ibid.*, vol. 6, p. 562.

⁴ Meeting of 16 May 1945, *ibid.*, p. 304. See also 5 June, *ibid.*, p. 346.

⁵ 4 and 5 June, *ibid.*, pp. 334, 342. (Virtually identical with final text in the Charter.) The Delegate of Norway abstained. See also Report of rapporteur of Committee I, 9 June, *ibid.*, pp. 400, 404; and Report of 13 June, *ibid.*, p. 459. Drafting Committee text, *ibid.*, p. 687.

⁶ *Ibid.*, pp. 334-5.

⁷ Cf. *ibid.*, p. 335, Delegates of United Kingdom and United States.

integrity.¹ The rapporteur of Committee I explained that paragraphs 1 and 4 protected the personality of the State as well as its territorial integrity and political independence.² The Commission adopted paragraph 4 in the form proposed by Committee I.³

The conclusion warranted by the *travaux préparatoires* is that the phrase under discussion was not intended to be restrictive but, on the contrary, to give more specific guarantees to small States and that it cannot be interpreted as having a qualifying effect.⁴ If it is asserted that the phrase may have a qualifying effect then writers making this assertion face the difficulty that it involves an admission that there is an ambiguity,⁵ and in such a case recourse may be had to *travaux préparatoires*,⁶ which reveal a meaning contrary to that asserted.

Nor is it possible to argue that the phrase must be given its 'plain meaning' which 'coincides with the limitations on the obligation of non-intervention which traditional international law recognises'.⁷ The reference to 'plain meaning' has little value and begs many questions,⁸ but, be that as it may, the phrase 'political independence and territorial integrity' has been used on many occasions to epitomize the *total* of legal rights which a State has. Moreover, it is difficult to accept a 'plain meaning' which permits evasion of obligations by means of a verbal profession that there is no intention to infringe territorial integrity⁹ and which was not intended by the many delegations which approved the text. Lastly, if there is an ambiguity the principle of effectiveness should be applied.¹⁰

'Or in any other manner inconsistent with the purposes of the United Nations'

The phrase has been relied upon in like manner to provide a basis for the argument that the Charter does not affect the legality of various forms of

¹ 15 June, *ibid.*, p. 68.

² *Ibid.*, p. 69.

³ 15 June, *ibid.*, p. 82; see also Report of rapporteur of Commission I, *ibid.*, p. 231, 21 June.

⁴ Goodrich and Hambro, *op. cit.*, pp. 103, 104-5; Oppenheim, *op. cit.*, vol. 2, p. 154; Waldock, *Recueil des cours*, 81 (1952-II), p. 493; Jiménez de Aréchaga, *Derecho constitucional de las Naciones Unidas* (1958), pp. 85-88.

⁵ See Goodrich and Hambro, *op. cit.*, p. 105; Bowett, *op. cit.*, pp. 146, 151-2, 186.

⁶ Hambro, *The Case Law of the International Court*, vol. 1, pp. 43-51.

⁷ Bowett, *op. cit.*, p. 152.

⁸ Lauterpacht, *The Development of International Law by the International Court* (1958), pp. 49-60.

⁹ Historical examples: the Pershing expedition, 1916; Hackworth, *Digest*, vol. 2, p. 292; Japanese Note to the President of the League Council, 21 February 1932; *American Journal of International Law*, 26 (1932), p. 343; Sir Pierson Dixon, *General Assembly, Official Records, First Emergency Special Session, 561st plenary meeting*, para. 102, 1 November 1956. Note also Article 2, paragraph 2, of the Charter. See, however, on Article 10 of the League Covenant and means of reconciling its obligation with the provisions of Article 15: Schucking and Wehberg, *Die Satzung des Völkerbundes*, pp. 276, 459, 461, 462; Ray, *Commentaire du Pacte*, p. 346; Barandon, *Le Système juridique de la Société des Nations pour la prévention de la guerre*, pp. 269-71; and Guggenheim, *Traité*, vol. 2, p. 250.

¹⁰ See Lauterpacht, *op. cit.*, pp. 227-30, 292-3; *Acquisition of Polish Nationality, P.C.I.J.*, Series B, No. 7, pp. 16-17.

self-help, for example, protection of nationals and their property, which existed in the customary law.¹ The protection of certain essential rights, it is argued, is consistent with the purposes of Article 1. This view ignores the presumption against self-help which lies behind the Charter as a whole and, once again, the principle of effectiveness. The phrase was not intended by the draftsmen to have a restrictive effect on paragraph 4 or on Article 51, and indeed it was probably meant to reinforce the prohibition of paragraph 4² and, perhaps, to refer to the legality of force when this took the form of enforcement action sanctioned by the Security Council.³

*The right of self-defence in the customary law and
Article 2, paragraph 4, and Article 51*

Apart from reference to phrases in paragraph 4 to which it is sought to give a restricted meaning, it can be argued that Article 51 and paragraph 4 of Article 2 were not intended to, and do not, restrict the right of Member States to use force in self-defence within the meaning of that concept to be found in the customary law. Article 51, it is said, refers merely to 'armed attack' because it was inserted for the particular purpose of clarifying the position of collective defence treaties which are concerned only with external attack, and being in this way specific it leaves the broader customary right, which is always implicitly reserved, intact.⁴ The problems which this view raises will be considered.

Bowett holds the view that paragraph 4 of Article 2 left the right of self-defence unimpaired and that the right implicitly excepted was not confined to reaction to 'armed attack' within Article 51 but permitted the protection of certain substantive rights:⁵

'Action undertaken for the purpose of, and limited to, the defence of a State's political independence, territorial integrity, the lives and property of its nationals (and even to protect its economic independence) cannot by definition involve a threat or use of force "against the territorial integrity or political independence" of any other state.'

The prohibition in paragraph 4 of Chapter II of the Dumbarton Oaks Proposals and in the final text of paragraph 4 in the Charter contains no

¹ Bowett, *op. cit.*, pp. 17, 186; Stone, *op. cit.*, pp. 43, 95-96.

² *U.N.C.I.O. Documents*, vol. 6, pp. 334-5 (Committee 1, Commission 1). The delegate of Brazil adverted to the possibility of a restricted interpretation of the phrase. The United States delegate 'made it clear that the intention of the authors of the original text was to state in the broadest terms an absolute all-inclusive prohibition; the phrase "or in any other manner" was designed to ensure that there should be no loopholes'. See also *ibid.*, pp. 342, 557 (Australian amendment); p. 558 (Bolivian and Brazilian amendments); p. 560 (Costa Rican amendment); p. 561 (Ecuador amendment); p. 563 (Iranian amendment); p. 564 (Norwegian amendment).

³ *Ibid.*, pp. 335, 400, 459.

⁴ Waldock, *loc. cit.*, p. 497; Bowett, *op. cit.*, pp. 182 et seq.; Stone, *op. cit.*, pp. 43-44, 97-98; Goodhart, *loc. cit.*, pp. 231-3; Green, *Archiv des Völkerrechts* (1957), p. 432; Fitzmaurice, *Sydney Law Review*, 3 (1959), p. 72; Piotrowski, *Revue de droit international* (Sottile), 35 (1957), p. 300.

⁵ *Op. cit.*, pp. 185-6. See also Goodhart, *loc. cit.*, p. 202.

reference to self-defence. Amendments proposed at San Francisco contained no reference to it either¹ with the exception of that of Panama:²

'Each State has a legal duty to refrain from any use of force and from any threat to use force in its relations with another State except as authorized by this Charter; but subject to immediate reference to and approval by the competent agency of the (Organization), a State may oppose by force an unauthorized use of force made against it by another State.'

In the discussions in Committee I of Commission I³ and the report of its rapporteur⁴, it was stated that paragraph 5 left the use of force 'in legitimate self-defence' unimpaired. There is no indication that this right was to be equated with that referred to in Article 51. On the other hand, the general tendency was towards a restrictive interpretation of any permission in relation to the use of force. Delegations were concerned that the Organization should have a near-monopoly of the use of force and the wide terms of paragraph 4 reflect the emphasis on prohibition rather than permission.⁵ There is not the slightest hint that legitimate self-defence comprehended action otherwise than against the use or threat of force.

The purpose and meaning of Article 51

The Dumbarton Oaks Proposals provided in Chapter VIII (C) (I) that 'nothing in the Charter should preclude the existence of regional arrangements or agencies' and in the same chapter paragraph C (2) provided that 'no enforcement action should be taken under regional arrangements . . . without the authorization of the Security Council'.⁶ Following agreement on voting procedure in the Security Council a statement by the delegations of the four Sponsoring Governments on voting procedure⁷ stated that the veto would apply to this authorization. This gave rise to concern as to the status of regional arrangements, in particular the Act of Chapultepec⁸ and

¹ *U.N.C.I.O., Documents*, vol. 6, p. 557 (Australia); p. 558 (Bolivia); p. 558 (Brazil); p. 560 (Costa Rica); p. 563 (Iran). A Norwegian amendment (p. 564) provided that: 'All members of the Organization shall refrain in their international relations from the threat of force and from any use of force not approved by the Security Council as a means of implementing the purposes of the Organization.' See *ibid.*, pp. 720-1, for rejection of the amendment by the Drafting Committee. Norwegian amendment also in vol. 3, p. 366.

² *Ibid.*, p. 565 (paragraph 7 of a 'new version' of Chapter II). See also *ibid.*, vol. 3, p. 265 at p. 270.

³ *Ibid.*, p. 334. See also Drafting Committee, report, at p. 721.

⁴ *Ibid.*, pp. 400, 459.

⁵ *Ibid.*, p. 304. Several delegates wanted the Organization to authorize any use of force before it could be lawful; *ibid.*, and see the Norwegian amendment, above, n. 1. See *U.N.C.I.O. Documents*, vol. 6, *passim*, discussion of the preamble and, especially, paragraph 3 of Article 2. See also Goodrich and Hambro, *op. cit.*, pp. 106-7. Note further *U.N.C.I.O. Documents*, vol. 3, pp. 292, 293 (Venezuelan proposals); p. 278 (Costa Rican comment); p. 328 (Netherlands amendments); p. 399 (Ecuador); Panamanian amendment, above, n. 2; and above, p. 236, n. 2.

⁶ Goodrich and Hambro, *op. cit.*, p. 580.

⁷ *Ibid.*, p. 216; 7 June 1945.

⁸ Hudson, *International Legislation*, vol. 9, No. 647.

the Pact of the Arab League.¹ An Australian amendment to avoid the effects of the veto in this respect was rejected in Committee 4 of Commission 3 at San Francisco.² However, the Committee approved a decision to insert a new paragraph in the Dumbarton Oaks text identical in all material respects with Article 51 of the final text of the Charter, and delegates explained the significance of the new article in relation to the principle of collective self-defence, regional arrangements and mutual assistance against aggression.³

It is worthy of notice that amendments were suggested to Chapter VIII (C) (2) of the Dumbarton Oaks Proposals even before the appearance of the agreement of the sponsoring Governments on voting procedure in the Security Council. Thus the Czechoslovak Government considered that the authorization of the Security Council should be given in advance and as a general rule for 'cases of immediate danger'.⁴ Amendments of this type might suggest that any proviso to the text would be understood to apply to cases other than actual armed attack. On the other hand, amendments suggested by France, the United Kingdom, the United States, the U.S.S.R. and China contemplated action without the authorization of the Security Council only in the case of measures against the renewal of a policy of aggression by the ex-enemy States and emphasized the general tendency to deny any resort to force independently of the Security Council.⁵

There is no indication in the discussions that the right of self-defence in the article was in contrast with any other right of self-defence permitted by the Charter or that the phrase 'if an armed attack occurs' was anything other than a characterization of the right of self-defence. Delegates referred to the content of the paragraph as 'the right of self-defence'.⁶ The Colombian delegate stated:⁷

'... if at any time an armed attack should ensue, that is, an aggression against a state which is a member of the regional group, self-defence, whether individual or collective, exercised as an inherent right, shall operate automatically within the provisions of the Charter, until such time as the Security Council may take the appropriate punitive measures against the aggressor state.'

¹ Hudson, *International Legislation*, vol. 9, No. 650.

² *U.N.C.I.O. Documents*, vol. 12, pp. 668, 766.

³ *Ibid.*, pp. 680-2. Senator Vandenberg was primarily responsible for the new text (p. 682). See also the Draft Report and Report of Wellington Koo, rapporteur, *ibid.*, pp. 723, 739; and Report by Subcommittee III/4/A, pp. 848-9. See also vol. 11, pp. 50, 51; vol. 15, pp. 87, 188; and the proposal for the amalgamation of amendments offered to Chapter VIII, Section C, prepared by the United States in consultation with the other Sponsoring Governments and France, 23 May 1945; vol. 3, pp. 634-5.

⁴ Observations on Dumbarton Oaks Proposals, 25 April 1945; *U.N.C.I.O. Documents*, vol. 3, p. 470. Cf. *ibid.*, pp. 379, 387 (French amendment); p. 483 (Turkish suggestions, 1 May 1945, 'cases of emergency'); p. 216 (Venezuelan proposals). See also *ibid.*, vol. 12, pp. 773, 777, 781, 784.

⁵ *Ibid.*, vol. 3, pp. 392, 575, 598, 601, 629. See also *ibid.*, vol. 11, p. 50; vol. 12, p. 765; vol. 15, p. 87.

⁶ *Ibid.*, pp. 702, 703 (Delegates of the United States and Mexico). See also Evatt, *The United Nations*, p. 27.

⁷ *U.N.C.I.O. Documents*, vol. 12, p. 687.

The very terms of Article 51 might be thought to preclude any view that its content is special and not general since it refers to 'the inherent right'; it is not incongruous to regard Article 51 as containing the only right of self-defence permitted by the Charter.¹ Its narrow and precise terms are explicable against the background of the general prohibition in Article 2, paragraph 4, and the general assumption made at San Francisco and evident in the text of Article 51, that the Organization was to have a near-monopoly of the use of armed force. Moreover, the proviso as to self-defence qualified a text which originally had regarded the authorization of the Security Council as necessary in all cases. It is significant that in the Japanese Peace Treaty and the Declaration of the Rights and Duties of States drawn up by the International Law Commission the right of self-defence is defined in the terms of Article 51 or in similar terms.²

The relationship of Article 51 and the right of self-defence in customary law

Even if it is accepted that Article 51 contains the sole content of self-defence within the Charter, it may be argued that the right of self-defence existing in general international law is still available to Members of the United Nations, this right being considerably broader than that stated in Article 51. This involves an attitude to the Charter exemplified by the following statement:³

¹ See Kelsen, *op. cit.*, pp. 791-2, 797-8, 914; Goodrich and Hambro, *op. cit.*, p. 107; Charter of the United Nations, Report to the President . . ., Dept. of St. Public. 2349, *Conference Series*, vol. 71, p. 38, quoted in Goodrich and Hambro, pp. 106-7; Kunz, *American Journal of International Law*, 41 (1947), p. 877; Briggs, *The Law of Nations* (2nd ed.), p. 986; Jessup, *A Modern Law of Nations* (1956), pp. 166-8; Bebr, *American Journal of International Law*, 49 (1955), pp. 172-3; Nguyen Quoc Dinh, *Revue générale de droit international public*, 52 (1948), p. 244; Wehberg, *Recueil des cours*, 78 (1951—I), p. 71; Blaine Sloan, this *Year Book*, 25 (1948), p. 30; Zourek, *Recueil des cours*, 92 (1957), p. 816; Nasim Hasan Shah, *American Journal of International Law*, 53 (1959), pp. 605, 612; Skubiszewski, *ibid.*, pp. 618-26; Nincic, *Int. Law Assoc.*, N.Y. Univ. Conference, 1958, *Committee on the Charter of the U.N., Report on Some Aspects of the Principle of Self-Defence* (by Schwarzenberger), p. 68; Calogeropoulos-Stratis, *Revue hellénique de droit international*, 6 (1953), pp. 226-7; Al Chalabi, *La Légitime défense en droit international* (1952), pp. 56-58; Wright, *Recueil des cours*, 98 (1959—III), p. 167; Jiménez de Aréchaga, *op. cit.*, p. 401. See also the Report of the 1956 Special Committee on the Question of Defining Aggression, *General Assembly, Official Records*, 12th session, Suppl., No. 16 (A/3574), paras. 39, 203-17; *I.L.C. Yearbook* (1949), pp. 108-11, 145-7, 163-4, 171, 179; Sixth Committee, *General Assembly, Official Records*, 12th session, 514th meeting, paras. 26-31; 517th meeting, paras. 5, 12. There is a general assumption on the part of representatives in these bodies that Article 51 defines the content of self-defence in the Charter.

² See below, pp. 246-7. In the proceedings of organs of the United Nations, Article 51 is commonly referred to as stating the criteria for self-defence under the Charter: see *General Assembly, Official Records*, First Emergency Special Session, 1-10 November 1956, 562nd meeting, paras. 31, 45, 105, 145, 319; Security Council, 11th year, 749th meeting, para. 33; and *Repertory of Practice of U.N. Organs* (1955), vol. 2, pp. 429-35. For the arguments of the United Kingdom Government during the Suez crisis see above, p. 233. See also the letter from that Government to the U.N. Secretary-General stating that action in bombing and strafing Yemeni gun positions was taken under Article 51; *New York Times*, 8 May 1958, p. 13, col. 5; p. 34, col. 5.

³ Bowett, *op. cit.*, pp. 184-5, also quoting Goodhart, *Recueil des cours*, 79 (1951—II), p. 192. See also Schwarzenberger, *ibid.*, 87 (1955—I), pp. 327 et seq. Criticisms of this attitude: Sixth

'We must presuppose that rights formerly belonging to member states continue except in so far as obligations inconsistent with those existing rights are assumed under the Charter . . . it is, therefore, fallacious to assume that members have only those rights which general international law accords them except and in so far as they have surrendered them under the Charter.'

If this statement means, for example, that the Members of the United Nations have not surrendered the right to prevent even the innocent passage of commercial aircraft through their airspace, since there is no provision for such surrender in the Charter, then it is stating the obvious. However, where the Charter has a specific provision relating to a particular legal category, to assert that this does not restrict the wider ambit of the customary law relating to that category or problem is to go beyond the bounds of logic. Why have treaty provisions at all?

This approach ignores the principle of effectiveness. Further, it ignores the generality of Article 51 in its reference to 'the inherent right', although the text does not of itself state that the inherent right has only the application specified. It is submitted that a restrictive interpretation of the provisions of the Charter relating to the use of force would be more justifiable and that even as a matter of 'plain' interpretation the permission in Article 51 is exceptional in the context of the Charter and exclusive of any customary right of self-defence. Against this it can be argued that Article 51 is expressed in the form of a reservation of an existing customary right in the same way as Article 2, paragraph 7, in the matter of domestic jurisdiction. If this view is accepted the question then arises as to whether the article not only reserves but also defines the customary right in a restrictive manner. Whichever approach is adopted the decisive consideration would seem to be that the prohibition in Article 2, paragraph 4, is in absolute terms and the delegations at San Francisco regarded it in this light: any use of force was to be authorized by the Organization and any proviso, implied or expressed, as to self-defence was understood to be an exceptional right, a privilege.¹ The whole object of the Charter was to render unilateral use of force, even in self-defence, subject to control by the Organization; and thus under Article 51 the right of self-defence can only be exercised 'until the Security Council has taken measures necessary to maintain international peace and security' and measures taken in its exercise 'shall be immediately reported to the Security Council and shall not in any way affect the authority and

Committee, *General Assembly, Official Records*, 12th session, 527th meeting, paras. 25, 26 (Röling); 531st meeting, paras. 9-11 (Castañeda). Curiously, elsewhere (this *Year Book*, 32 (1955-6), p. 139) Bowett states that any exception to Article 2, paragraph 4, must be strictly construed.

¹ See *U.N.C.I.O. Documents*, vol. 6, *passim*. See also Goodrich and Hambro, *op. cit.*, pp. 106-7; Ninčić, *Jugoslovenski revija za međunarodno pravo*, 2 (1955), p. 180 (*International Political Science Abstracts*, 6 (1956), p. 242); Wehberg, *Recueil des cours*, 78 (1951-I), pp. 84-85; Drost, *The Crime of State*, vol. 1, p. 271; Skubiszewski, *American Journal of International Law*, 53 (1959), pp. 618-26; Sorensen, *Recueil des cours*, 101 (1960-III), pp. 240-1; Jiménez de Aréchaga, *op. cit.*, pp. 401-7.

responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security'.

One other matter which may be relevant is the placing of Article 51 in Chapter VII, although initially it was in Chapter VIII on Regional Arrangements. The change resulted from a Soviet proposal supported by the argument that, if left in Chapter VIII, the reservation would have too narrow a scope as it would be limited to self-defence in connexion with Regional Arrangements.¹ This perhaps suggests a wide interpretation. The position of the article in Chapter VII rather than Chapters II or VIII may also provide the basis for an argument that the reference to 'armed attack' was natural and not exclusive in intention since Chapter VII was concerned with grave breaches of the peace and the phrase was appropriate to describe such a situation.² Though suggestive the arguments from the position of the article do not seem in any way to be decisive.

It is possible that the terms in which the right of self-defence is defined in Article 51 are much closer to the customary law *as it existed in 1945* than is commonly admitted. The use of force in riposte to force was the only generally accepted view as to the justified use of force in self-defence and the delegations at San Francisco naturally did not regard the phrasing of the article as in any sense an innovation in its reference to self-defence. Those writers who assert that Article 51 does not deny Members 'the customary right of self-defence' assume that the customary law became static by 1920 or earlier and ignore the possibility that the customary right may have received some more precise delimitation in the period between 1920 and 1945. It seems to the present writer that to regard any form of action formerly held to be self-defence, at a time when self-defence was a phrase regarded as interchangeable with 'self-preservation' and 'necessity', as within a surviving 'customary right', is a very arbitrary process. To go further, and assert that the Charter obligations are qualified by this vague customary right, is indefensible. By what logical process can the protection of certain essential rights, for example those listed by Bowett,³ be selected from the various rights enumerated by Westlake in 1904⁴ as aspects of 'self-defence'? Such selection can have little relation to State practice. It is submitted that Article 51 is not subject to the customary law and that, even if it were, this customary right must be regarded in the light of State practice up to 1945.

¹ This information was supplied by Professor Sir Humphrey Waldock. Other materials: *U.N.C.I.O. Documents*, vol. 12, pp. 682-3, 693-4; vol. 15, pp. 52, 84.

² See Waldock, *Recueil des cours*, 81 (1952-II), p. 497; and speech of Lord Kilmuir L.C. *Parliamentary Debates, H.L.*, vol. 199, col. 1352, 1 November 1956. See criticism in Bowett, *op. cit.*, p. 184, n.

³ *Op. cit.*, pp. 185-6, 270. And see Waldock, *loc. cit.*, pp. 495 et seq.

⁴ *International Law* (1904), vol. 1, p. 299; quoted above, pp. 201-2.

Does Article 51 permit anticipatory self-defence?

The article states that the right of self-defence remains unimpaired 'if an armed attack occurs against a Member of the United Nations'. It is believed that the ordinary meaning of the phrase precludes action which is preventive in character.¹ In this respect the French text is less equivocal than the English since its literal translation would read 'in a case where a United Nations Member is the object of an armed aggression'. The Spanish text simply reads 'en caso de ataque armado'. No further clarification of the phrase is to be gained from study of the *travaux préparatoires*. However, the discussions at San Francisco assumed that any permission for the unilateral use of force would be exceptional and would be secondary to the general prohibition in Article 2, paragraph 4. There was a presumption against self-help and even action in self-defence within Article 51 was made subject to control by the Security Council. In these circumstances the precision of Article 51 is explicable. The comments of Governments on Chapter VIII, section C, of the Dumbarton Oaks Proposals give no real assistance. A Turkish comment referred to 'cases of emergency' but later spoke of 'the country being attacked';² and a comment by the Czechoslovak delegation referred to 'cases of immediate danger'.³

Certain jurists do not accept the view that the article was intended to restrict action in case of immediate danger.⁴ In maintaining this position the following arguments have been advanced:

¹ Kelsen, *The Law of the United Nations*, pp. 269, 797-8; and in *American Journal of International Law*, 42 (1948), pp. 791-2; Beckett, *The North Atlantic Treaty*, p. 13; Wehberg, *Recueil des cours*, 78 (1951-I), pp. 70, 81; Pompe, *Aggressive War: An International Crime*, pp. 98, 100; Tucker, *International Law Quarterly*, 4 (1951), p. 29 (*semble*); Nguyen Quoc Dinh, *Revue générale de droit international public*, 52 (1948), pp. 240-4; Bebr, *American Journal of International Law*, 49 (1955), pp. 173-4 (*semble*); Kunz, *ibid.*, 41 (1947), pp. 877-8; Kulski, *ibid.*, 44 (1950), p. 461; Skubiszewski, *ibid.*, 53 (1959), p. 622 (citing Bramson, 3 *Annales Universitatis Mariae-Skłodowska, Sectio G*, pp. 63, 81-82); Goodrich and Hambro, *Charter of the United Nations* (2nd ed.), pp. 107, 300; Jessup, *A Modern Law of Nations* (1956), pp. 166-7; Oppenheim, *International Law* (7th ed.), vol. 2, p. 156; Al Chalabi, *La Légitime défense en droit international*, pp. 78-82; Calogeropoulos-Stratis, *Revue hellénique de droit international*, 6 (1953), pp. 227-8; Bentwich and Martin, *A Commentary on the Charter of the United Nations*, p. 107; Sorensen, *Recueil des cours*, 101 (1960-III), p. 240. See also *I.L.C. Yearbook* (1949), pp. 108-11, 14th meeting, paras. 61-112, particularly, paras. 68, 69, 81, 86, 89, 91-95, 98-104 (some difference of opinion: see views of Sandstrom, Briery and Hsu); and Sixth Committee, *General Assembly, Official Records*, 9th session, 408th meeting, para. 32, and 415th meeting, para. 39 (Castañeda); 408th meeting, para. 42 (Sapozhnikov); 411th meeting, para. 15 (Abushkevich); 413th meeting para. 11 (Petrzelka); *ibid.*, 12th session, 514th meeting, para. 28 (Rolin); 519th meeting, para. 10 (Alfonsin); 531st meeting, para. 8 (Castañeda); 532nd meeting, para. 30 (Morozov). Also: Report of 1953 Special Committee on the Question of Defining Aggression, *ibid.*, 9th session, Suppl. No. 11 (A/2638), paras. 63, 65. For an instance of preventive action justified in terms of Article 51 see above, p. 239, n. 2 *in fine*.

² *U.N.C.I.O. Documents*, vol. 12, p. 781.

³ *Ibid.*, p. 773. Cf. Wright, *Recueil des cours*, 98 (1959-III), p. 167.

⁴ See Stone, *Legal Controls of International Conflict*, p. 244, n. 8 (but see his text); Hsu, Sixth Committee, *General Assembly, Official Records*, 7th session, 337th meeting, para. 43; Waldock, *Recueil des cours*, 81(1952-II), pp. 497-8; Röling, Sixth Committee, *General Assembly, Official Records*, 9th session, 410th meeting, para. 43; 417th meeting, para. 16; Piotrowski, *Revue de droit international* (Sottile), 35 (1957), p. 297.

1. Where there is evidence that an attack is being mounted it may be said to have begun to occur though it has not passed the frontier.¹ This is ingenious but rather casuistic. It involves delicate questions of unequivocal intention to attack and an assumption that an attack can occur, as it were, constructively.

2. To read Article 51 restrictively is to protect the aggressor's right to the first stroke.² The argument *ab inconvenienti* cannot affect clear words and such an argument would apply with equal, if not greater force, to a text which might be said to justify preventive action in vaguely defined situations.

3. That Article 51 is subject to the customary law, which permitted anticipatory action.³ The relationship of the article to the customary law has been examined above. If the customary right is still available to Members of the United Nations there is, of course, no need to consider the interpretation of the precise words of Article 51.

4. Reliance is placed on a passage in the First Report of the United Nations Atomic Energy Commission in 1946:⁴

'In consideration of the problem of violation of the terms of the treaty or convention, it should also be borne in mind that a violation might be of so grave a character as to give rise to the inherent right of self-defence recognised in Article 51.'

This passage can hardly be regarded as an authoritative interpretation of the Charter or as an amendment of the Charter by the incidental expression of views by a subsidiary organ of the Security Council.⁵ There is some substance in the view that the action foreseen against the State violating the control convention was in the nature of a sanction and that it did not have any quality of self-defence. This being so, the Report of the A.E.C. has no direct bearing on self-defence. The British representative on the A.E.C. stated that:⁶

'His Majesty's Government fully endorse the emphasis laid in the United States statement on the need for condign, immediate and effective penalties against violation of the future international scheme of control. The greatest deterrent value against any such violation will be the knowledge that punishment will be inevitable and overwhelming.'

¹ Waldock, loc. cit. Cf. Nagendra Singh, *Nuclear Weapons and International Law* (1959), pp. 126-7.

² Waldock, loc. cit.

³ Bowett, *Self-defence in International Law*, pp. 188-9; Schwarzenberger, *Recueil des cours*, 87 (1955-I), pp. 327 et seq.

⁴ U.N. Doc. AEC/18/Rev. 1, p. 24. Referred to by Bowett, op. cit., p. 189. See also Report of the 1956 Special Committee on the Question of Defining Aggression, *General Assembly, Official Records*, 12th session, Suppl. No. 16 (A/3574), para. 56.

⁵ Cf. Goodrich and Hambro, op. cit., p. 300 ('If Article 51 were clearly open to this interpretation . . .'); and Oppenheim, op. cit., vol. 2, p. 156, n. The passage appeared, however, in General Assembly Resolution 191 (III) of 4 November 1948.

⁶ Quoted by Blackett, *Atomic Weapons and East-West Relations* (1956), p. 91. See also Blackett, *Military and Economic Consequences of Atomic Energy* (1948), p. 135.

5. Professor Waldock has stated that in so far as the International Court of Justice in the *Corfu Channel* case (*Merits*) considered the precautions taken by the British warships on 22 October, in case of attack by Albanian shore batteries, as lawful, the Court did not take a narrow view of the inherent right reserved by Article 51.¹

There is no firm support for this view in the Judgment.² The Court was considering the general question of delictual responsibility and had regard to all the circumstances of the case; it was concerned with the dominant character of the passage, which was not affected by the precautions; and in fact there was no preventive self-defence but merely the taking of precautions to defend the ships in case of attack.

6. A number of eastern European treaties of friendship and mutual assistance³ provide for immediate aid in the case of a renewal of a 'policy of aggression' by Germany, and it has been suggested that they indicate a readiness to resort to anticipatory self-defence. The suggestion cannot be met by the argument that these treaties are connected with Article 107 of the Charter since the argument is probably unsound.⁴ However, the evidential value of the treaties is not very considerable. Their texts are too vague, and it is common for military aid to be given under mutual assistance pacts in case of a threat of attack but this aid does not necessarily involve direct invasion of the potential aggressor.⁵

It can only be concluded that the view that Article 51 does not permit anticipatory action is correct and that the arguments to the contrary are either unconvincing or based on inconclusive pieces of evidence. Some difficult though somewhat academic cases in which preventive action on a small scale might be justified are reserved for discussion later.⁶ It must also be observed that to object to anticipatory action does not avoid the difficulty of deciding when resort to force has occurred.⁷

What is an armed attack?

There is no explanation of the phrase 'armed attack' in the records of the San Francisco Conference, perhaps because the words were regarded as sufficiently clear. Since 1945, however, some jurists have suggested glosses on the article. Thus it has been stated that 'armed attack' may include

¹ Loc. cit., p. 501.

² Cf. Bowett, op. cit., p. 190. See also Skubiszewski, *American Journal of International Law*, 53 (1959), pp. 622-3, n. 28.

³ Example: Treaty of Friendship and Mutual Aid, Poland and Czechoslovakia, signed 10 March 1947; *United Nations Treaty Series*, vol. 25, No. 365, Article 3.

⁴ Skubiszewski, loc. cit., pp. 632-3; Bowett, this *Year Book*, 32 (1955-6), p. 144, and *Self-defence in International Law*, p. 227.

⁵ For various views: Skubiszewski, loc. cit., pp. 614-15, 624-6; Kulski, *American Journal of International Law*, 44 (1950), pp. 460-1; Bowett, this *Year Book*, 32 (1955-6), pp. 143-4, and *Self-defence in International Law*, pp. 226-7.

⁶ Below, pp. 258-9, 262-3.

⁷ Below, pp. 254, et seq.

support for revolutionary groups.¹ The Foreign Relations Committee of the United States Senate commented as follows on the phrase 'armed attack' in Article 5 of the North Atlantic Treaty:²

'Experience has shown that armed attack is ordinarily self-evident . . . ; it should be pointed out that the words "armed attack" clearly do not mean an incident created by irresponsible groups or individuals, but rather an attack by one State upon another. Obviously, purely internal disorders or revolutions would not be considered "armed attack" within the meaning of Article 5. However, if a revolution were aided and abetted by an outside power such assistance might possibly be considered an armed attack.'

Since the phrase 'armed attack' strongly suggests a trespass it is very doubtful if it applies to the case of aid to revolutionary groups and forms of annoyance which do not involve offensive operations by the forces of a State. Sporadic operations by armed bands would also seem to fall outside the concept of 'armed attack'.³ However, it is conceivable that a co-ordinated and general campaign by powerful bands of irregulars, with obvious or easily proven complicity of the Government of a State from which they operate, would constitute an 'armed attack', more especially if the object were the forcible settlement of a dispute or the acquisition of territory.

Assuming for the purposes of argument that the phrase 'armed attack' is capable of such extensive interpretation, a right to resort to force against various forms of indirect aggression cannot be derived from Article 51 if the requirement of proportionality is strictly observed.⁴ Indirect aggression and the incursions of armed bands can be countered by measures of defence which do not involve military operations across frontiers. The same approach renders superfluous speculation as to the application of the article to border incidents and minor attacks.⁵

¹ Kelsen, *U.S. Naval War College, International Law Studies* (1954), vol. 49 (Washington, 1957), p. 88; and in *American Journal of International Law*, 42 (1948), pp. 791-2; Heindel, Kalijarvi and Wilcox, *ibid.* 43 (1949), p. 645; Tucker, *International Law Quarterly*, 4 (1951), p. 31; Stone, *op. cit.*, p. 244, n. 8.

² U.S. Senate, Report of the Committee on Foreign Relations on the North Atlantic Treaty, Exec. Report No. 8, p. 13; and see Heindel *et al.*, *loc. cit.*

³ Wright, *American Journal of International Law*, 51 (1957), p. 271. Cf. on departure of volunteers, Brownlie, *International and Comparative Law Quarterly*, 5 (1956), p. 578. Piotrowski, *Revue de droit international* (Sottile), 35 (1957), pp. 299-300, would apply Article 51 to activities of armed bands and the use of forces of third States, i.e. as agents, but not to naval blockade or unarmed indirect aggression. For the Israeli view that *fedayeen* raids constituted an armed attack: *General Assembly, Official Records*, First Emergency Special Session, 561st plenary meeting, para. 105, 1 November 1956. See further below, pp. 257-8.

⁴ Whether Article 51 contains the whole content of the right of self-defence for U.N. Members or merely an aspect of it, proportionality must be a requirement for the exercise of the right to which it refers. It is of the essence of self-defence: see Jiménez de Aréchaga, *op. cit.*, pp. 410-12. Another view: Kunz, *American Journal of International Law*, 41 (1947), p. 878.

⁵ For the view that it only applies to a grave breach of the peace or invasion by a large organized force acting on the orders of a government: Waldock, *loc. cit.*, p. 497, criticized by Bowett, *Self-defence in International Law*, p. 184, n.

The relations of the customary law and the United Nations Charter

If the correctness of the view that for Members of the United Nations Article 51 of the Charter defines the right of self-defence and is not qualified or supplemented by the customary law is accepted, then States not bound by the obligations of the Charter have less extensive obligations than Member States. It is very probable, however, that the usual distinction between general and particular international law is not valid in this context. As it has been suggested previously the customary law which is to be compared with the Charter is that of 1945 and not that of 1920 or an earlier period. The phrasing of Article 51 was almost certainly not regarded as a novel development of the law by the delegations at San Francisco, and generally speaking by 1945 self-defence was understood to be justified only in case of an attack by the forces of a State. And quite apart from this consideration, the Charter may be regarded as objective or general international law. It has received the adherence of nearly every State, and most of the States which are not Members of the United Nations have expressly accepted the principles and obligations of the Charter.¹

Moreover, the provisions of the Charter have had strong influence on State practice since 1945 and the terms of Article 51, or very similar terms, have appeared in several important multilateral treaties and draft instruments.² Thus Article 3 of the Inter-American Treaty of Reciprocal Assistance of 1947³ provided for individual or collective self-defence in case of an 'armed attack', and the Japanese Peace Treaty expressly refers to Article 51.⁴ The Draft Declaration on Rights and Duties of States adopted by the International Law Commission in 1949 provided in Article 12 that 'every State has the right of individual or collective self-defence against armed attack'.⁵

¹ The character of the Charter as objective law may also be supported by reference to Article 2, paragraph 6, and Article 103 of the Charter. Compare also the acceptance of the Hague Regulations on Land Warfare as customary law, e.g. by the I.M.T. at Nuremberg: *Judgment*, Cmd. 6964, p. 65. See also Jessup, *A Modern Law of Nations* (1956), pp. 166-8; Tucker, *International Law Quarterly*, 4 (1951), p. 26, n. Oppenheim (8th ed.), op. cit., vol. 1, pp. 828-9; Lauterpacht, *The Development of International Law by the International Court* (1958), pp. 176 et seq., 311; Sorensen, *Recueil des cours*, 101 (1960—III), p. 236. States outside the United Nations have nearly all become parties to instruments which contain affirmations of adherence to the principles of the Charter. Examples: Agreement on Mutual Defense Assistance, Republic of Korea and the United States, signed 26 January 1950; *American Journal of International Law*, 45 (1951), Suppl., p. 73; Declaration by the Federal Republic of Germany, Final Act of the London Conference, 3 October 1954, Part V, *ibid.*; Lord Ismay *NATO, The First Five Years, 1949-1954*, p. 241; Treaty on Relations, U.S.S.R. and German Democratic Republic, signed 20 September 1955, *Soviet News*, No. 3256, 22 September 1955. In November 1961 the Members of the United Nations numbered 103. Cf. McNair, *Law of Treaties* (1961), pp. 216-18.

² Above, pp. 220-1, 239.

³ *United Nations Treaty Series*, vol. 21, No. 324.

⁴ *Ibid.*, vol. 136, No. 1832, Article 5.

⁵ Report of I.L.C.; First Session, para. 46; *General Assembly, Official Records*, 4th session, Suppl. No. 10 (A/925); *American Journal of International Law*, 44 (1950), Suppl., pp. 15, 18. See also *I.L.C. Yearbook* (1949), pp. 108-11, 145-7, 163-4, 171, 179. See also Treaty of Alliance,

It is submitted that there is considerable justification for the conclusion^{*} that the right of self-defence, individual or collective, which has received general acceptance in the most recent period has a content identical with the right expressed in Article 51 of the Charter.

VII. SELF-DEFENCE ON THE HIGH SEAS AND CLAIMS TO JURISDICTION ON THE BASIS OF SELF-DEFENCE

'Self-defence on the high seas' is frequently treated autonomously in the literature, and the present form of presentation is primarily a concession to custom and convenience although a case for separate treatment can no doubt be supported on analytical grounds. This rubric has often been the precursor of a discussion of a great multitude of problems, and at the outset it will be convenient to give a brief dismissal of certain items which have relevance to the general question of jurisdiction over vessels on the high seas but little or no relevance to questions of self-defence. The legal position is, of course, dominated by the customary rule that vessels on the open sea remain under the jurisdiction of the flag State.¹ Certain exceptions to this rule in respect of control of fisheries² and trade in arms,³ and the protection of submarine cables,⁴ have been created by conventions. The right of approach in case of suspicion of slaving also rests on conventional law⁵ although earlier doctrine in the United States and England had assimilated this case to that of piracy⁶ and the International Law Commission has shown readiness to place piracy and the slave trade on the same basis in their work of codification.⁷ There is a customary right of approach on suspicion of piracy, and of seizure and punishment, a right which is universally recognized.⁸

United Kingdom and Jordan, signed 22 March 1946, *United Nations Treaty Series*, vol. 6, No. 74, Article 5; and the Treaty of Alliance and Mutual Assistance, United Kingdom and France, 4 March 1947, *ibid.*, vol. 9, No. 132, Article 2.

¹ Oppenheim, *op. cit.*, vol. 1, p. 330.

² Colombos, *The International Law of the Sea* (3rd ed.), pp. 304 et seq.

³ *Ibid.*, p. 323. See also: *I.L.C. Yearbook* (1950—I), p. 199, para. 25; *ibid.* (1950—II), p. 42, para. 47; p. 72, para. 25.

⁴ *Ibid.*, p. 341; Oppenheim, *op. cit.*, p. 733; Pitt Cobbett, *Leading Cases and Opinions* (6th ed.), p. 323; *Le Louis* (1817) 2 Dods. 210; *Madrazo v. Willes* (1820) 3 B. and A. 353; *The Antelope* (1825) 10 Wheaton 66; *I.L.C. Yearbook* (1950—II), pp. 41, 72 (para. 25); *ibid.* (1951—I), p. 352, para. 93.

⁵ *I.L.C. Yearbook* (1951—I), pp. 350, 354, 359; *ibid.* (1951—II), p. 83, para. 44 et seq.; *ibid.* (1950—I), p. 198, para. 22.

⁶ Hall, *International Law* (8th ed.), p. 311; Oppenheim, *op. cit.*, pp. 609, 616; Colombos, *op. cit.*, p. 332; Judge John Bassett Moore, *The Lotus, P.C.I.J.*, Ser. A, No. 10 (1927) p. 70; *In re Piracy Iure Gentium* [1934] A.C. 586; *I.L.C. Yearbook* (1950—I), p. 197, para. 133; *ibid.* (1951—I), p. 350, para. 64 et seq.; p. 359, para. 73; Secretariat Memorandum, paras. 12–17, *ibid.* (1950—II), p. 70. If it is desired to maintain strict prohibition of a right of approach in peacetime it will be necessary to attain a satisfactory and generally accepted definition of piracy: cf. Convention on the High Seas, 1958 (below, p. 253, n. 3), Article 15.

The right of hot pursuit has the overwhelming support of State practice and the authority of courts and jurists as an established part of customary law.¹ The right has been stated as follows in the Harvard Draft:²

'A state may continue on the high seas the pursuit of a vessel of another state and may effect its arrest for a violation of international law, if such pursuit was begun while the vessel was in the territorial waters of that state.'

This right exists as a particular customary right and is independent of the legal category of self-defence³ although it has occasionally been based upon the right of self-protection and self-defence.⁴ It exists in order that the exercise of jurisdiction within territorial waters should be effective.

Similarly claims to take special measures on the high seas to conserve fisheries must be based upon treaty or upon the need to establish a customary right to take certain necessary measures. There is no point in discussing the problem in the context of self-defence unless it is desired to expound a doctrine of defence of vital interests. References in nineteenth-century practice to self-defence in relation to protection of seal fisheries in the north Pacific occurred at a time when the concept had a very wide connotation which included protection of interests.⁵ The award in the *Behring Sea* arbitration of 1893 denied the United States the right of protection which she had claimed.⁶

It must now be recognized that the principle of the contiguous zone for purposes of enforcing customs, fiscal and sanitary laws has become a part of the customary law, and that enforcement of laws within such a zone is permissible. Once again particular rules of customary law are involved and there is no reason for regarding this form of jurisdiction as being based on the right of self-defence.⁷ The fact that in the past such jurisdiction has been put on a basis of self-defence by some writers⁸ merely indicates the breadth of the concept of self-defence in the nineteenth century. It is not legally permissible to exercise powers of control by virtue of a contiguous zone established for purposes of national security, for the reason that the

¹ Oppenheim, *op. cit.*, p. 604; Hall, *op. cit.*, p. 309; Hackworth, *Digest*, vol. 2, p. 700; Gidel, *Droit international de la mer*, vol. 3, p. 339; *Rapport de J.P.A. François*, A/CN.4/17, I.L.C. Yearbook (1950—II), p. 36 at p. 43, para. 53; Secretariat Memorandum, A/CN.4/32, *ibid.*, p. 70, paras. 18–19.

² *American Journal of International Law*, 23 (1929), Spec. Suppl., Article 21. See now: Convention on the High Seas adopted by the U.N. Conference on the Law of the Sea, 1958, Article 23.

³ See Bowett, *Self-defence in International Law*, pp. 82–86.

⁴ Hershey, *American Journal of International Law*, 13 (1919), p. 13; *The North*, 37 S.C.R. (1906), p. 385 at p. 400 *per* Idington J.

⁵ Moore, *Digest*, vol. 1, p. 898 (U.S. Minister in London); p. 909 (Russian Minister of Foreign Affairs).

⁶ *Ibid.*, p. 913.

⁷ Cf. Bowett, *op. cit.*, p. 69; Oppenheim, *op. cit.*, p. 497. But see below, pp. 249–50 on nuclear tests on the high seas.

⁸ For example: Westlake, *International Law* (1910), vol. 1, p. 175. For a recent assertion of the theory by the Indian representative in the Sixth Committee of the United Nations General Assembly see *International Studies* (Bombay, 1959), vol. 1, p. 95.

right to a contiguous zone for such a purpose has not received general acceptance in State practice.¹ The Provisional Articles on the Régime of the High Seas drafted by the International Law Commission make no reference to a security zone,² and it was deliberately excluded from Article 66 of the final draft produced by the Commission in 1956.³ The draft convention on the territorial sea drawn up by the Geneva Conference on the Law of the Sea in 1958 does not recognize security zones.⁴ It is significant that the extensive Pan-American 'zone of security' established in 1939 as 'a measure of continental self-protection' was the subject of protests by the belligerent States.⁵

In recent years the view has been asserted that States have a right to exclude temporarily the vessels and aircraft of other States from designated areas of the high seas for the purpose of carrying out nuclear weapon tests.⁶ Such claims are not, of course, related to the concept of a contiguous

¹ See Briggs, *Law of Nations* (2nd ed.), p. 377; *Second Report* by François, A/CN.4/42, para. 104 seq., *I.L.C. Yearbook* (1951—II), p. 91; *ibid.* (1951—I), pp. 324—7; *ibid.* (1950—I), pp. 204—5; *First Report* by François, A/CN.4/17, paras. 84—93, *I.L.C. Yearbook* (1950—I), p. 46; and, especially, Secretariat Memorandum, A/CN.4/32, paras. 81—107, conclusion in para. 107, *I.L.C. Yearbook* (1950—II), p. 82; Gidel, *Le Droit international public de la mer*, vol. 3, pp. 458—61; Brierly, *The Law of Nations* (5th ed.), p. 178; Fitzmaurice, this *Year Book*, 31 (1954), p. 377; Reinkemeyer, *Die Sowjetische Zwölfmeilenzone in der Ostsee und die Freiheit der Meeres* (1955), chap. 12.

² Report of I.L.C. on work of its 5th session, 1953, *General Assembly, Official Records*, 8th session, Suppl. No. 9 (A/2456), para. 105.

³ See Fitzmaurice, *International and Comparative Law Quarterly*, 8 (1959), p. 118. The commentary to Article 66 states that the 'enforcement of customs and sanitary regulations will be sufficient in most cases to safeguard the security of the State'.

⁴ See Article 24 of the Convention. Text: Cmd. 584, Misc. No. 15 (1958) at p. 25; *American Journal of International Law*, 52 (1958), p. 834 at p. 840. See also Fitzmaurice, *loc. cit.* In 1958 only nine States claimed security zones extending beyond limits of territorial waters: according to the Synoptical Table prepared by the Secretariat, *The Law of the Sea*, Soc. Comp. Legis. and Int. Law (1958), pp. 34 et seq. But see also the next note. The United Kingdom Government recognizes contiguous zones for customs, fiscal and sanitary purposes only: *Parliamentary Debates, H.C.*, vol. 554, written answer, col. 64; quoted *International and Comparative Law Quarterly*, 6 (1957), p. 132. The convention includes enforcement of immigration regulations in Article 24; see Fitzmaurice, *loc. cit.*, pp. 117—18.

⁵ Meeting of Foreign Ministers of the American Republics, Panama City, Final Act, 3 October 1939; *American Journal of International Law*, 34 (1940), Suppl., p. 17. The document ('The Declaration of Panama') is political in tone and does not employ legal terms. British and French reaction: *Revue de droit international* (La Pradelle) (1940), pp. 348, 513. Cf. Hyde, *op. cit.*, vol. 3, pp. 2348—52; Brown, *American Journal of International Law*, 34 (1940), pp. 112—16; Redslob, *Traité*, p. 160; Accioly, *Traité* (1942), vol. 2, pp. 88—90; MacChesney, *Situation, Documents and Commentary on Recent Developments in the International Law of the Sea*, U.S. Naval War College, vol. 51 (1957), pp. 573 et seq. National legislation provides for the establishment of 'defence' zones or areas which are not limited to the extent of territorial waters, and which are not claimed as contiguous zones, in the following cases: Ethiopia, Maritime Proclamation No. 137 of 1953, 'Laws and Regulations on the Regime of the Territorial Sea', *U.N. Legislative Series* (1957), p. 128; Republic of Korea, Marine Defence Act No. 104 of 1950, *ibid.*, p. 175. See further the regulations by which Canada and the United States have established 'air defence identification zones': MacChesney, *loc. cit.*, and Murchison, *The Contiguous Air Space Zone in International Law* (1956), appendixes I and II.

⁶ McDougal and Schlei, *Yale Law Journal*, 64 (1955), pp. 648 et seq.; McDougal, *American Journal of International Law*, 49 (1955), pp. 356—61; McDougal, Burke and Vlasic, *ibid.*, 54 (1960), pp. 80—81. British practice: see *International and Comparative Law Quarterly*, 7 (1958),

zone, but they are based in part on the right to prepare for self-defence.¹ This argument seems to be only a sophisticated variant of arguments based on security, necessity, self-preservation and other forms of the broad doctrines of the nineteenth-century jurists, and it has been condemned by Gidel.²

In the case of recognized rights of jurisdiction the law is not at all developed on the question of the degree to which force may be used to enforce jurisdiction, as opposed to the case of defence of territorial sovereignty. It is doubtful, for example, if vessels ignoring fishing limits can be bombed and strafed. It might, of course, be argued self-help is less objectionable in regard to rights over the sea and one interpretation of the Judgment in the Corfu Channel case (Merits) would support this view.³

The particular problems of self-defence on the high seas

(a) It seems clear that vessels on the open sea may use force to repel attack by other vessels, or by aircraft, proportionate to the threat offered. This right must rest on general principles whether the analogy of vessel and State territory is accepted or not.⁴

(b) Nor can there be any doubt that the armed forces of the flag State⁵ may use reasonable force to defend vessels from attack whether by pirates or forces acting with or without the authority of any State. Early in 1959 Mexico severed diplomatic relations with Guatemala following an attack by aircraft of Guatemala on Mexican fishing craft on 31 December 1958. In a statement on 23 January 1959, the President of Mexico stated that the use of force to repel force would have been authorized by Article 51 of the

p. 548. U.S. practice: note to Japan, 23 March 1956, *The Times*, 24 March 1956 (military exercises 'a traditional use of the high seas').

¹ McDougal, *American Journal of International Law*, 49 (1955), p. 261.

² In *Fundamental Problems of International Law*, *Festschrift für Jean Spiropoulos*, pp. 173-205, at pp. 191-4. Cf. Margolis, *Yale Law Journal*, 64 (1955), p. 629. And see Resolution adopted by the Geneva Conference on the Law of the Sea, 1958, *American Journal of International Law*, 52 (1958), p. 864.

³ Above, pp. 223-4; but see below, pp. 252-4. Some national laws relating to contiguous zones provide for the use of force by enforcement authorities under certain conditions: Colombia, Customs Law No. 79 of 1931, 'Laws and Regulations on the Regime of the Territorial Sea', *U.N. Legislative Series* (1957), p. 115; Poland, Decree of 23 March 1956 Concerning the Protection of State Boundaries, *ibid.*, p. 237; United States, Anti-Smuggling Act 1935, *ibid.*, p. 311, 49 Stat. 517, 518, 529, as amended. See also below, pp. 253-4.

⁴ See Lansing to the U.S. Secretary of the Treasury, 17 February 1917, on the arming of merchant vessels in time of peace; Hackworth, *Digest*, vol. 7, p. 365; Roosevelt, Message to Congress, 9 October 1941, *ibid.*, p. 366; Cordell Hull, Statement before House Committee on Foreign Affairs, 13 October 1941, *ibid.*; and the same before the Senate Committee on Foreign Affairs, 21 October 1941, *ibid.* See also Guggenheim, *Traité*, vol. 2, p. 329, n. 2; and Colombos, *International Law of the Sea* (3rd ed.), pp. 632-3. There is much controversy on the status of armed merchantmen in wartime: see Oppenheim, *op. cit.*, vol. 2, pp. 468-71. Vehicles in Outer Space will have similar rights.

⁵ See below, pp. 253.

Charter.¹ Some difficulty arises in the case of repeated attacks on shipping from a land base. If forces from the flag State counter-attack or intercept over territorial waters or territory of the source of attack, it is possible to argue that infringement of territorial sovereignty and integrity is not a proportionate reaction to attack on shipping.

(c) The controversial question which now remains for discussion concerns the legality of seizure of vessels on the high seas in time of peace on the ground of necessity of defence of the State.

In Hyde the rule is stated in the following terms:²

'On grounds of self-defence an aggrieved State may subject a foreign ship to restraint on the high seas and in time of peace, if the conduct of those controlling the vessel is such as to render the seizure of her the necessary mode of warding off threatened and instant danger. Circumstances may in fact rarely combine to warrant such preventive action.'

Writers using wide and vague categories of self-defence and self-preservation state a similar rule.³

The judicial authorities in favour of such a right are neither numerous nor unequivocal. In his Dissenting Opinion in the case of *The Lotus* Judge Moore stated that:⁴

'No State is authorized to interfere with the navigation of other States on the high seas in time of peace except in extraordinary cases of self-defence' (*Le Louis* (1817) 2 Dodson, 210, 243-4).

However, Lord Stowell's remarks in *Le Louis* are rather ambiguous and it is probable that he was confining the right of search to the case of exercise of belligerent rights against neutrals and took the foundations for this right to be 'the necessities of self-defence'. He expressly denied such a right in time of peace.⁵ The Umpire in his awards in *The Mary Lowell* stated that the claimants had forfeited their right to the protection of the American flag and that the acts of the Spanish authorities were done in self-defence;⁶

¹ *The Times*, 26 January 1959. For collective defence against attacks on merchant ships by submarines, surface vessels and aircraft, see the Nyon Agreement of 14 September 1937, Cmd. 5568; and the Supplementary Nyon Agreement of 17 September 1937, Cmd. 5569. Texts also: *American Journal of International Law*, 31 (1937), Suppl., pp. 179, 182.

² *International Law* (2nd rev. ed.), vol. 1, p. 245. Support for this view: Oppenheim, op. cit., p. 301, n.; Waldock, *Recueil des cours*, 81 (1952-II), pp. 464-6; Scott, *Cases on International Law* (1937), pp. 320-2, n.; Colombos, op. cit., p. 251; Bowett, op. cit., p. 71; Hall, *International Law* (8th ed.), p. 328; Brierly, *The Law of Nations* (5th ed.), pp. 241-2 ('This view, however, is not universally accepted'); Cheng, *General Principles of Law*, p. 77; Hackworth, *Digest*, vol. 2, p. 709; Fitzmaurice, this *Year Book* 31 (1954), p. 377; Basdevant, *Recueil des cours*, 58 (1936-IV), pp. 542-3.

³ Westlake, *International Law* (1910), vol. 1, pp. 171-3; Hall, op. cit., pp. 328-30. Cf. speech of U.S. Counsel in the *Behring Sea* arbitration.

⁴ *P.C.I.J.*, A/10, p. 69.

⁵ *Le Louis* (1817) 2 Dodson, p. 210 at pp. 243-6. But at p. 246 he makes an ambiguous statement which might admit self-defence in time of peace. See also *Church v. Hubbard* (1804), 2 Cranch, 187, 234-5, per Marshall C.J.; *Rose v. Himmely* (1807), 4 Cranch, 241, 287, per Johnson J.

⁶ *The Mary Lowell*, Moore, *International Arbitrations*, vol. 3, pp. 2774-5.

but in the second award, which reaffirmed the first, he stated that he was not considering the case as one concerning the United States or the regularity of the capture but merely the 'personal situation of the owners of the property'.¹

In relation to the seizure of the *Virginus*, a vessel carrying reinforcements for insurgents in Cuba, by a Spanish warship, the British Government only complained of the summary execution of nationals and not of the seizure of the vessel:²

'Much may be excused in acts done under the expectation of instant damage in self-defence by a Nation as well as an individual. But after the capture of the *Virginus* and the detention of the crew was effected, no pretence of imminent necessity of self-defence could be alleged.'

As a matter of general principle, if the doctrine of *The Caroline* and the customary right of self-defence permitted anticipatory action in necessity of self-defence against the territory of a State, they should provide a basis for a right of anticipatory action on the open sea. In recent years the French Government has asserted a right to seize on the high seas vessels suspected of aiding the Algerian rebels.³

However, the right of self-defence on the high seas in time of peace has at no time received universal approval.⁴ The United States Government did not accept the legality of the seizure of the *Virginus* on this ground,⁵ and some eminent opinions deny any right of visit and search in time of peace except on suspicion of piracy.⁶

In a report submitted to the International Law Commission in 1950 François stated the law as follows:⁷

'Le droit international du temps de paix n'admet comme mesure de police générale que la reconnaissance du navire, c'est-à-dire le droit de reconnaître l'identité et la nationalité du navire, à l'exclusion de toute enquête du pavillon par examen des papiers de bord et a fortiori, à l'exclusion de toute perquisition.'

¹ Ibid., pp. 2776-7.

² Moore, *Digest*, vol. 1, p. 895; *Parliamentary Papers* (1874), vol. 76, p. 85.

³ 16 October 1956 (*The Athos*); *The Times*, 27 October 1956; 19 January 1958 (*The Slovenija*); *The Times*, 21 January 1958. Cf. Czech protest, *ibid.*, 13 April 1959.

⁴ See Brierly, *op. cit.*, pp. 241-2; Briggs, *The Law of Nations* (2nd ed.), p. 391 (he refers to 'the alleged right'); Pella, *Revue de droit international* (Sottile), 34 (1956), p. 170.

⁵ Williams, U.S. Attorney-General, Opinion of 19 December 1873; Moore, *Digest*, vol. 2, pp. 895 et seq. See also Secretary of State to the Peruvian Minister, 22 May 1858, *ibid.*, p. 891-2. But see, for a fairly clear admission of the right by the U.S. Government: *I.L.C. Yearbook* (1950-II), pp. 61-62.

⁶ See Gidel, *Le Droit international public de la mer*, vol. 1, pp. 348-55; Fauchille, *Traité* (1922), p. 66; Harvard Research, *The Law of Territorial Waters*, Article 20; *American Journal of International Law*, 23 (1929), Spec. Suppl., pp. 333, 351-7; Schwarzenberger, *International Law* (3rd ed.), vol. 1, p. 341 (*semble*).

⁷ A/CN.4/17, paras. 37-41, para. 37, *I.L.C. Yearbook* (1950-II), p. 41. See the discussion in the Commission in 1950, *ibid.* (1950-I); 64th meeting, paras. 120-38; 65th meeting, paras. 1-20. The second report of François, A/CN.4/42, paras. 39-43, *ibid.* (1951-II), pp. 81-83; and the discussion in the Commission in 1951, *ibid.* (1951-I), pp. 350, 539.

The memorandum submitted by the Secretariat referred to the views of the British Government and of writers based on *The Virginius* and observed:¹

‘On ne saurait cependant accepter cette prétendue limitation à la règle de l’interdiction d’interférence dans la navigation en haute mer des pavillons étrangers. Il n’y a là qu’une application de la trop fameuse théorie de la “nécessité” qui est la négation même de tout droit international. . . . Le droit international admet occasionnellement . . . des exceptions à l’interdiction d’interférence, mais seulement dans des zones de haute mer rigoureusement déterminées et pour donner satisfaction à des intérêts limitativement énumérés. Le droit international repousse un soi-disant droit généralisé de self-defence qui exclut par sa notion même toute réglementation formulée et précisée.’

In the draft articles on the régime of the high seas adopted at the 7th session of the International Law Commission there is provision for a right of seizure in cases of piracy only and the comment on Article 21 states that no right was included in the article to board a vessel suspected of acts hostile to the State to which the warship belongs ‘at a time of imminent danger for the security of that State’, since such a vague formula was open to abuse.²

In the Convention on the High Seas adopted by the United Nations Conference on the Law of the Sea in 1958, Article 22, paragraph 1, provided:³

‘Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting:

- (a) That the ship is engaged in piracy;⁴ or
- (b) That the ship is engaged in the slave trade; or
- (c) That, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

It might be argued that such a provision cannot displace the ‘inherent right’ of self-defence; to which it can be answered that the provision merely prevents acts of seizure allegedly in self-defence outside territorial waters.⁵ In any case it only applies to merchant ships. The legality of action against imminent threats from the armed forces of a State just outside territorial waters will be considered subsequently. The drafts produced by the

¹ A/CN.4/32, 14 July 1950, paras. 20–22, para. 22, *I.L.C. Yearbook* (1950–II), p. 71. Assumed to be the work of Gidel.

² Report of I.L.C. on work of 7th session, 1955, *General Assembly, Official Records*, 10th session, Suppl. No. 9 (A/2934), ch. ii, Articles 13–21. Cf. Report on Work of Fifth session, 1953, *ibid.*, 8th session, Suppl. No. 9 (A/2456), ch. iii, para. 105; Report on work of 6th session, *ibid.*, 9th session, Suppl. No. 9 (A/2693), ch. iv, Article 20.

³ Text: *The Law of the Sea, Final Act and Annexes of the Conference*, Soc. of Comp. Legis. and International Law; *American Journal of International Law*, 52 (1958), p. 842.

⁴ Defined in Article 15.

⁵ In the Convention, ‘high seas’ includes a contiguous zone (Article 1).

International Law Commission and the Convention on the High Seas adopted at Geneva provide very strong evidence that the right of approach and of seizure in the case of merchant ships is now very limited and that the doctrine of *The Virginius* is obsolescent even if it has not yet been superseded.¹ Threats provided by vessels carrying aid to insurgents can be neutralized within territorial waters: it is doubtful if such a threat is of a kind which would satisfy *The Caroline* test.

VIII. MODALITIES OF SELF-DEFENCE: SOME MORE PARTICULAR PROBLEMS

The foregoing discussion constitutes an attempt to present the main lines of development in the law and rests on the relatively unsophisticated categories of State practice. The jurist must bring order into the sources without undue regimentation of the materials and should avoid what are perhaps over-subtle probings and logic chopping which tend to leave an impression of uncertainty and which breed pessimism among those attempting to formulate generally applicable rules of law. Those who demand the perfect definition present an attitude of mind more suited perhaps to the design of precision instruments than the making or formulation of legal rules. At the same time, the jurist may be expected to foresee and explain difficulties which are ignored, or only hinted at, in the existing State practice. In the sensitive field of international conflict what at first sight appear to be analytical niceties may present bases for serious breaches of or threats to the peace. In the pages which follow some special problems relating to the question of self-defence will receive consideration. Some of the problems, such as the meaning of force and the concept of armed attack, are fundamental to the subject although they have been accorded little attention in the literature. The other problems for the most part concern difficult cases of the sort which are bound to occur in the context of the legal regulation of the complexities of international relations and of modern techniques of warfare.

The use of force

The law contains many references to 'resort to force' or 'the use of force' and such terms have been employed in Article 2, paragraph 4, of the

¹ Waldock, *Recueil des cours*, 81 (1952—II), pp. 465–6, speaking of the views of the law in the Harvard Research and the Secretariat Memorandum, remarks that it is illogical to allow the exercise of jurisdiction to prevent smuggling of merchandise but not to allow self-protection against smuggling of men and arms to rebels. It is thought, with respect, that there is a distinction to be made between acts within a specified contiguous zone and the comparative *laissez-faire* of self-protection and the interception of merchant ships on the open sea. See also above, pp. 248–9, on security and defence zones.

United Nations Charter and in other important instruments.¹ The use of force is implicit in the terms 'war of aggression', 'invasion', 'attack' and, at least until 1945, 'aggression'. Although the terms 'use of force' and 'resort to force' are frequently employed by writers² they have not been the subject of detailed consideration. There can be little doubt that 'use of force' is commonly understood to imply a military attack, an 'armed attack', by the organized military, naval or air forces of a State; but the concept in practice and principle has a wider significance. The agency concerned cannot be confined to the military and other forces under the control of a ministry of defence or war, since the responsibility will be the same if a government acts through 'militia', 'security forces' or 'police forces' which may be quite heavily armed and may employ armoured vehicles.³ Moreover, Governments may act by means of completely 'unofficial' agents, including armed bands and 'volunteers', or may give aid to groups of insurgents on the territory of another State.⁴

More delicate questions may arise. Kelsen has asserted that 'use of force' in Article 2, paragraph 4, of the Charter includes both the use of arms and a violation of international law which involved an exercise of power in the territorial domain but no use of arms.⁵ It is true that the *travaux préparatoires* do not indicate that the phrase applied only to *armed* force:⁶ but there is no evidence either in the discussions at San Francisco or in State or United Nations practice that it bears the meaning suggested by Kelsen. Indeed, in view of the predominant view of aggression and the use of force in the previous twenty years it is very doubtful if it was intended to have such a meaning. Similarly, whilst it is correct to assume that paragraph 4 applies to force other than armed force,⁷ it is very doubtful if it applies to economic measures of a coercive nature.⁸

It is also necessary to decide if use of weapons which do not involve any explosive effect, with concomitant shock waves and heat, involves a use of force. Such weapons include bacteriological, biological and chemical

¹ E.g. the Inter-American Treaty of Reciprocal Assistance, Article 1, and the Bogota Charter: Article 18 (references above, pp. 220-1). Cf. *U.N.C.I.O. Documents*, vol. 3, p. 582, paras. 4 and 6 ('act of violence').

² Examples: Eagleton, *Revue générale de droit international public*, 39 (1932), p. 509; Wright, *American Journal of International Law*, 29 (1935), p. 381. Théry, *La Notion d'agression en droit international* (1937), pp. 111 et seq., points to the vagueness of the concept of resort to force.

³ *Verbatim Records of the Meetings of the Ten-Power Disarmament Committee*, Misc. No. 10 (1960), Cmnd. 1152, pp. 578-9, 594, 608, 812-13, 831-2.

⁴ It is not possible to pursue the problems of complicity and agency in the present discussion. See, however, below, p. 260.

⁵ *Collective Security under International Law*, p. 57; and in *The United Nations: Ten Years' Legal Progress*, pp. 4-5; McDougal and Feliciano, *Yale Law Journal*, 68 (1958-9), pp. 1059-60.

⁶ Above, pp. 232 et seq.

⁷ Kelsen, loc. cit.; Zourek, *Recueil des cours*, 92 (1957-II), p. 814. Cf. Alfaro, A/CN.4/L.8, *I.L.C. Yearbook* (1951-II), p. 37, para. 41; *ibid.* (1951-I), p. 111, paras. 45a-49.

⁸ Zourek, loc. cit., p. 834, considers that it does so apply. *Contra*, Jiménez de Aréchaga, op. cit., pp. 84-85.

devices such as poison gas and 'nerve gases'. In so far as such weapons, if used at all, will be employed probably in conjunction with other more orthodox weapons, the question is academic. At the same time effective legal restraint of self-help and conquest demands their classification.¹ It would seem that use of these weapons could be assimilated to the use of force on two grounds. In the first place the agencies concerned are commonly referred to as 'weapons'² and as forms of 'warfare'. More convincing is the second consideration, the fact that these weapons are employed for the destruction of life and property and are often described as 'weapons of mass destruction'.³ More difficult to regard as a use of force are deliberate and forcible expulsion of population over a frontier,⁴ release of large quantities of water down a valley and the spreading of fire through a built-up area or woodland across a frontier.⁵

Further problems arise in the case of violations of airspace and territorial waters by units of the armed forces of a State, since the penetration may be undetected and/or unopposed, and no actual use of force may occur. Violations of airspace by military aircraft give rise to protest by the territorial sovereign but in general do not lead to specific charges of violation of Article 2, paragraph 4, of the Charter or of 'aggression'.⁶ However, in particular cases such violations have been referred to as 'acts of aggression'.⁷ The Soviet Government has stigmatized military intelligence flights by reconnaissance aircraft over Soviet territory and territorial waters as 'acts of aggression'.⁸ It is necessary to distinguish four types of situation.

¹ We are concerned here with the problem of unlawful resort to force. States bound by the Geneva Protocol of 1925 are prohibited from using such weapons under any conditions (apart from reservations on reciprocity) and it is possible that a customary rule or a 'general principle of humanity' forbid the use of such weapons for all States. See Greenspan, *The Modern Law of Land Warfare*, pp. 356-9; Stone, *Legal Controls of International Conflict*, pp. 555-7; Singh, *Nuclear Weapons and International Law*, pp. 162-6; *United Kingdom Manual of Military Law*, Part III (1958), para. 107, n. 1 (b).

² See *Verbatim Records of the Ten-Power Disarmament Committee*, pp. 910, 917, 923 (Annexes 7 and 8), 928, 935.

³ *Ibid.*, pp. 910, 923 (Annex 7), 928, 935; Alfaro, loc. cit.; Aroneanu, *La Définition de l'agression*, p. 106; Jiménez de Aréchaga, op. cit., p. 85. However, 'nerve gas' if it exists, may incapacitate temporarily although it cannot be said to destroy, but its use would in any case be followed by an entry of military forces.

⁴ Cf. Degras, *Soviet Documents on Foreign Policy*, vol. 2, pp. 448, 453, 469, 502.

⁵ Cf. below, pp. 262-3.

⁶ Degras, op. cit., vol. 3, p. 490; Soviet Note to U.S. Government, 10 July 1956, *Soviet News*, No. 3428, 11 July 1956; Soviet Note of 15 December 1956, *ibid.*, No. 3534, 17 December 1956; Soviet Note of 27 June 1958, *ibid.*, No. 3867, 30 June 1958; Soviet Note of 21 July 1958 *ibid.*, No. 3883, 23 July 1958. Saudi-Arabian protest to U.K., *The Times*, 14 February 1956; Czechoslovak protest to U.S., April 1955, *ibid.*, 22 April 1955. See also *Survey of International Affairs, 1949-1950*, pp. 18, 494-5; Lissitzyn, *American Journal of International Law*, 47 (1953), pp. 569 et seq. Cf. Chinese P.R., Statement of 2 September 1956, People's China, No. 18, 1956, on 'provocative violations of China's territorial air and waters' by U.S. planes and naval vessels.

⁷ First Committee, *General Assembly, Official Records*, 5th session, 407th meeting, plenary meetings, 319th meeting, para. 12 et seq.

⁸ Notes to U.S., 10 May 1960, *Soviet News*, No. 4266, 11 May 1960; and 16 May 1960, *ibid.* No. 4271, 18 May 1960; Notes to Turkey and Pakistan, 13 May, *ibid.*, No. 4269, 16 May 1960;

First, aerial and territorial sea intrusions may be made in the course of an armed attack, and even an isolated violation may involve an attack on a single vital objective. Secondly, the intrusion may not be part of an attack but consist in an act of self-help which will be carried out in such a manner that the territorial sovereign is powerless to prevent it. 'Operation Retail' by the Royal Navy of 12-13 November 1946 in the north Corfu Strait was of this character.¹ Such intrusions are forms of dictatorial intervention and would seem to involve a use of force, even if in fact no resistance is encountered.² Thirdly, the intrusion may be deliberate and illegal but not form a part of any resort to force: military intelligence flights and tactics of 'psychological warfare' come within this category. However, such flights may be regarded by the State which is their object as circumstantial evidence of an intention to attack or preparation for further attacks: it is this aspect which has given rise to epithets such as 'aggressive activities', 'acts of aggression', 'hostile acts' and the like. Lastly, violations of territorial airspace and waters may be the result of negligence or inevitable accident. In practice it is, of course, difficult for the recipient to distinguish the four types at the time of commission and defensive measures may not bear any close relation to the four categories. Questions of defence in reaction to aerial intrusions will be considered subsequently.

The concept of armed attack

Particularly relevant to the question of self-defence are certain considerations of a general nature relating to the concept of armed attack and the mechanics of attack, its beginning, and the quantum of force employed. The points considered arise also in relation to the concepts of 'resort to' and 'use of' force. It is not to be assumed, however, that every unlawful use of force will involve an armed attack in the tactical or military sense of the phrase. Thus a naval blockade involves an unlawful use of force³

Notes to U.K., U.S. and Norway, 11 July 1960, *ibid.*, No. 4305, 12 July 1960; Note to U.S. 2 August 1960, *ibid.*, No. 4318, 3 August 1960; Soviet complaint to the Security Council, 19 May 1960, *ibid.*, No. 4273, 20 May 1960.

¹ *Corfu Channel case (Merits)*, I.C.J. Reports, 1949, p. 35.

² Cf. the German 'peaceful invasion' of Bohemia and Moravia in March 1939. On which see above, p. 218. Cf. the Italian invasion of Albania: Langer, *Seizure of Territory*, p. 245; *Documents on British Foreign Policy, 1919-1939*, Third Series, vol. 5, p. 120.

³ It appears in the Politis draft definition of aggression presented to the Committee on Security Questions of the Disarmament Conference of 1932-3; in the Soviet draft presented to the same committee and in Soviet drafts presented to the Sixth Committee of the U.N. General Assembly and the Special Committees on Defining Aggression. References to these documents: Report of the 1956 Special Committee on the Question of Defining Aggression, Annexes; Stone, *Aggression and World Order* (1958), *Appendix*; and above, p. 222, n. 2. See also Iranian-Panamanian draft, A/AC.77/6.9, Report of the 1956 Special Committee on the Question of Defining Aggression, *General Assembly, Official Records*, 12th session, Suppl. No. 16 (A/3574), p. 31; Mexico, Working Paper, A/AC.77/L.10, *ibid.*, pp. 32-33; draft of Dominican Rep., Mexico, Paraguay and Peru, A/AC.77/L.11, *ibid.*, p. 33; Philippine amendments, *U.N.C.I.O. Documents*, vol. 3, p. 538. Some of these definitions refer also to air blockade.

although the tactical posture is passive since its actual enforcement includes the use of force against vessels of the coastal State.

It is considered that the terms 'attack', 'use' and 'resort to' imply an act or the beginning of a series of acts. This statement, though perhaps pleonastic, is necessary in view of the opposition of some to the principle of the first attacker, the 'priority principle', in definitions of aggression.¹ To describe any act is to determine when it is committed and to describe its characteristics, and it would seem that the 'priority principle' is inherent in all definition. The question is, of course, closely related to that of anticipatory self-defence.² The real problem is to determine what is an attack or resort to force as a matter of law. A requirement stated by some writers is that the use of force must attain a certain gravity and that 'frontier incidents' are excluded.³ The category 'frontier incident' is certainly vague but from the point of view of assessing responsibility *ex post facto* the distinction is only relevant in so far as the minor nature of an attack is *prima facie* evidence of absence of intention to attack, or honest mistake, or simply the limited objectives of an attack. When the justification of self-defence is raised the question becomes one of fact, viz., was the reaction proportionate to the apparent threat?

The question of anticipatory self-defence has been examined above and it has been suggested that although the classical or customary law recognized a right of anticipatory action, considerations of principle were unfavourable to it and the customary rule has lately been under attack. In particular the terms of Article 51 of the Charter would seem to preclude preventive action. The customary rule is usually stated to permit action only in exceptional cases but little guidance is available as to what situations justify anticipatory action beyond the verbal formula of Webster in the *Caroline* case. In all probability the question which should be posed is not when is anticipatory action justified but, when has an attack occurred? This is a question which is not solved by reference to the 'priority principle'. Preparations for attack can only be countered by preparations to resist

¹ For definitions expressly stating the principle: Report of the 1956 Special Committee, loc. cit., Annexes. Criticism of such definitions: Stone, *Aggression and World Order*, pp. 69-72; Fitzmaurice, Sixth Committee, *General Assembly, Official Records*, 9th session, 406th meeting, para. 22; and 416th meeting, para. 18; Report of the 1956 Special Committee, loc. cit., paras. 72, 73; Aroneanu, op. cit., pp. 251-5; Alfaro, *I.L.C. Yearbook* (1951-II), p. 38, para. 44. See also Zourek, *Recueil des cours*, 92 (1957-II), pp. 818-22; Al Chalabi, *La Légitime défense*, pp. 78-82; Kelsen, *Collective Security under International Law*, pp. 58, 61; McDougal and Feliciano, *Yale Law Journal*, 68 (1958-9), pp. 1093-6; *Verbatim Records, Ten Power Disarmament Committee*, pp. 447, 541.

² Above, pp. 225-8.

³ Al Chalabi, op. cit., pp. 74-78; McDougal and Feliciano, op. cit., pp. 1115-20. See also Report of the Secretary-General, A/2211, paras. 299-306; Sixth Committee, *General Assembly, Official Records*, 6th session, 279th meeting, para. 13; 281st meeting, para. 10; 283rd meeting para. 9; *ibid.*, 9th session, 417th meeting, para. 4; Report of 1956 Special Committee, loc. cit., para. 78. Cf. Delbos, French Foreign Minister, *Documents on British Foreign Policy, 1919-1939*, Third Series, vol. 1, p. 83 (enclosure in No. 106).

effectively, and in general activities which do not affect the territorial domain of a State including its airspace and territorial waters, do not justify forcible measures of defence. Thus, if an unexplained force of war vessels or aircraft approach a State over the high seas or the airspace over them, this will constitute a threat to the peace¹ but, it is submitted, does not of itself justify forcible measures of self-defence since there is no resort to force by the putative aggressor and there is no unequivocal intention to attack.²

It may be that in certain cases technical means of countering the instrument of aggression will not adequately ensure protection if action is only taken when the object enters the territorial domain. Thus it would be reasonable to put an interception system into operation against a rocket approaching through airspace over the high seas, the airspace of third States or through Outer Space. If the State which launched the rocket has frontiers contiguous with the State threatened the preventive measures may be taken over the territory of the putative aggressor.³ Such relaxation should only be allowed in the case of rockets in flight: if it is extended to fast aircraft and other instruments the possibilities of abuse of the law increase.

The situation in which there is an unequivocal intention to attack unaccompanied by an actual use of force creates problems of its own: what measures of defence may be taken by a State which is faced with a declaration of war or other statement of intention to attack, or expired ultimatum, issuing from a State which gives no sign of following the statement of intention or fulfilment of the condition by a resort to force? It is suggested that the requirement of proportionality should still place restrictions on reaction to this situation although acts which would otherwise have been equivocal may be treated as offensive operations. Thus a naval force of a State which had stated its intention to attack, approaching territorial waters, might be regarded as offensive and intercepted on the high seas. The dangers of permitting defensive action outside the territorial domain even in exceptional cases such as the approach of rockets may be minimized if the proportionality principle is observed and some distinction made between interception and defence, on the one hand, and retaliation, on the other. The whole problem is rendered incredibly delicate by the existence of long-range missiles ready for use: the difference between attack and imminent attack may now be negligible.⁴

¹ See Article 39 of the U.N. Charter. Similar problems will arise if vehicles approach *via* Outer Space.

² *Contra*, Rölíng, Report of the 1956 Committee on the Question of Defining Aggression, *loc. cit.*, para. 206.

³ Obviously such action is justified even if the rocket was launched without authority or by mistake.

⁴ The problems can probably be approached most successfully by means of organizational measures rendering surprise attacks difficult to achieve. Cf. on orbiting space vehicles: *Verbatim Records, Ten Power Disarmament Committee*, pp. 843-4, 922.

Problems relating to self-defence

There remain some rather assorted problems relating to self-defence consideration of which has not been essential to the discussion hitherto. The question of lawful defensive measures in the face of indirect aggression may arise not infrequently in practice. In so far as there is a use of force by forces controlled by a foreign State this may be met by lawful measures of self-defence including forcible measures proportionate to the danger. Yet it is very difficult in this context to say what are proportionate measures. In the case of sporadic incursions by armed bands by land or sea effective measures may be taken to prevent incursion without any operations against the parent State.¹ Interception may occur on the frontier or at the limit of territorial waters. However, preventive action has been taken against armed bands on a number of occasions² and the legality of such action will depend on the status of anticipatory action in the modern law. More delicate problems arise in the case of the State which gives military aid to an aggressor, or which gives aid to or exercises control over rebel groups or other irregular forces. It is suggested that so far as possible defensive measures should be confined to the territory of the defending State and the hostile forces themselves unless there is clear evidence of a major invasion across a frontier which calls for extensive military operations which may not be confined to merely protecting the frontier line. The precise difficulty in the case of indirect aggression is to avoid major breaches of the peace of wide territorial extent arising from defensive measures based on vague evidence of foreign complicity.

In the present connexion it might be argued that 'armed attack' in Article 51 of the Charter refers to a trespass, a direct invasion, and not to activities described by some jurists³ as 'indirect aggression'. But providing there is control by the principal, the aggressor State, and an actual use of force by its agents, there is an 'armed attack'.⁴

An area of responsibility which has not been adequately charted concerns the measures which may be taken against ships and aircraft which trespass. In respect of intrusion by aircraft, present practice seems to be that the territorial sovereign may give orders to the intruder to land or to make an exit on an approved course, failing which force may be used proportionate to the risk to security constituted by the presence of the aircraft.⁵

¹ There is no real support in State practice for an alleged right of hot pursuit over frontiers: see the present writer, *International and Comparative Law Quarterly*, 7 (1958), pp. 733-4; and Bowett, *Self-defence in International Law*, pp. 38-41.

² Above, p. 226, n. 1. See also on the *Caroline* and *Virginius* incidents, above, pp. 186, 252-4.

³ e.g. Kelsen, loc. cit.

⁴ Cf. Pompe, *Aggressive War, An International Crime*, pp. 110-12; Al Chalabi, *La Légitime défense*, pp. 86-88. See above, pp. 257-8.

⁵ The practice is considered by Lissitzyn, *American Journal of International Law*, 47 (1953), pp. 559-89.

However, the materials are often equivocal and do not make a clear distinction between the problem of self-defence against a use of force and the different question of apprehending trespassers. In general the practice seems to be that there is no right to shoot down trespassers unless they refuse or appear to refuse to land. However, if the penetration is by unidentified fast aircraft which persist in a deliberate and deep penetration of airspace, it may be that in view of the destructive power of even a single nuclear weapon carried by an aircraft the territorial sovereign is justified in taking without any warning violent and immediate preventive measures.¹ This is a rare instance in which a use of force may be justified although no actual attack has occurred. It is very doubtful if maritime trespassers in territorial waters may be subjected to violent measures unless they are engaged in an attack² or are carrying aid to rebels.³ Nevertheless, it must be emphasized that ruthless measures against trespassers may be not only illegal as being in excess of reasonable defensive measures, but also as ignoring 'elementary considerations of humanity, even more exacting in peace than in war'.⁴

Similar problems arise if foreign forces remain on State territory after the consent of the territorial sovereign has been withdrawn. Is such a holding over a use of force? It is submitted that it will be if there is armed resistance or threats in answer to attempts by the sovereign to remove such forces.⁵

A matter which does not receive sufficient notice in the literature is the existence of a right of self-defence on the part of States against acts of individuals for which no State can be said to bear responsibility.⁶ In many cases of incursion by armed bands and activities by volunteers it is possible to raise the question of State responsibility as a result of complicity or negligent omission. In such cases if action is taken against the groups in

¹ See *ibid.*, pp. 586-7. See also the Soviet protests relating to the U2 incident in May 1960: Soviet Note to U.S. 10 May, *Soviet News*, No. 4266, 11 May 1960. The note refers to 'aggressive reconnaissance', 'military reconnaissance' and 'aggressive aims'. In a complaint to the Security Council (*ibid.*, No. 4273, 20 May 1960), the Soviet Government referred to the possibility of such aircraft carrying nuclear arms. See also Gromyko, speeches in the Security Council on 23 and 26 May: *ibid.*, Nos. 4275, 4277. Lissitzyn *op. cit.*, p. 586, n. 102, seems to permit forcible measures against reconnaissance aircraft as such. The Indian Government has threatened to shoot down intruding aircraft flying from the north: Nehru on 21 November 1960, *The Times*, 22 November 1960. Cf. Dutch decree of 1939, Deak and Jessup, *A Collection of Neutrality Laws*, Suppl., 1940, pp. 823 (8)—823 (9). See also on the legal aspects of the U2 incident: Wright, *American Journal of International Law*, 54 (1960), p. 837; and a note, *Columbia Law Review*, 61 (1961), p. 1074.

² Above, pp. 257-9.

³ Above, p. 254.

⁴ *Corfu Channel case (Merits)*, *I.C.J. Reports*, 1949, p. 4 at p. 22.

⁵ It is doubtful whether armed action to remove foreign forces is self-defence properly so-called or simply lawful measures to remove a trespasser. See Bowett, *op. cit.*, pp. 36-37. Cf. Litvinov, Disarmament Conf., 1933, *Actes . . . Série B, Procès verbal de la Comm. gen.*, vol. 2, pp. 237-9; Report of Secretary-General, A/2211, paras. 325-7.

⁶ Exceptions: Basdevant, *Recueil des cours*, 58 (1936—IV), p. 545; Bowett, *op. cit.*, pp. 55-56. Action against insurgents in a neighbouring State trespassing across the frontier raises similar problems.

self-defence any subsequent dispute as to the legality of the action will be one between Governments. It is, however, possible that no State responsibility will be involved. Nationals may undertake expeditions which are prepared in conditions of secrecy or geographical remoteness with the result that no fault can be imputed to the State of origin of the persons concerned. Again, inhabitants of an area for some reason not under the sovereignty of any State may undertake aggressive activities. There can be little doubt that States have a right of self-defence in such a case and that such a plea could be raised should charges of crimes against humanity or genocide be made in consequence of action taken. However, the assertion must be made on the basis of principle and policy since the legal materials relating to self-defence in international law contemplate action against States only. Nevertheless, it has always been assumed that force could be used to repel pirates at sea although the right to punish pirates under general international law gives any action against them the character of a sanction, an exercise of jurisdiction, rather than mere self-defence.¹

One other question remains. In the period of the League certain writers argued that there was not only a right of self-defence but a duty imposed on States attacked to resist.² In so far as such arguments purported to be based on interpretation of the Covenant, in particular Article 8 thereof, they have no lasting significance. However, the matter does not rest there. Some sort of case can be made out for the existence of a duty in general international law. It can be argued that any attack is a threat to international peace generally and that resistance if practicable is called for as a matter of international policy. Further, analogies may be drawn from the duties of neutral States to prevent breaches of neutrality under Hague Conventions V and XIII of 1907.³ Some writers assert the existence of a duty to act in collective defence.⁴ Nevertheless, there is no substantial basis for such a duty in positive law. Writers do not now refer to its existence even as a possibility.⁵

Special cases of necessity

Some instances may be considered in which serious danger to the territory of a State arises otherwise than as a result of a use of armed force. Thus if State B controls the upper, and State A the lower reaches of a river

¹ Oppenheim, *op. cit.*, vol. i, p. 616; Judge John Bassett Moore, Dissenting Opinion, in the *Lotus* case, *P.C.I.J.*, Series A, No. 10, p. 70.

² See Castberg, *Acta Scandinavica Juris Gentium*, 1 (1930), pp. 1-18; Møller, *ibid.*, 2 (1931), pp. 40-44 and 3 (1932), pp. 94-105; Barandon, *Le Système juridique de la Société des Nations pour la prévention de la guerre*, p. 294; Report to the Fifth Assembly by Politis and Benes, quoted above, p. 203. *Contra*, Wehberg, *Acta Scandinavica*, 2 (1931), pp. 21-39, 45-48.

³ Castberg, *loc. cit.* Texts: Scott, *The Hague Conventions* (3rd ed.), pp. 133, 209.

⁴ Redflob, *Traité*, p. 435. And see Bowett, *Self-defence in International Law*, pp. 202-5.

⁵ In the past some writers have referred to a duty of self-preservation. Cf. Vattel, above, p. 185.

and reservoirs on the territory of State B are threatened by natural forces, or the territorial authorities negligently or wantonly loose quantities of water, causing a threat of floods to State A, the latter would seem to be justified in taking preventive action on the territory of State B. Such action should be immediately reported to the Security Council, its particular purpose made known to the Government of State B, and the situation must be such that previous complaint to the local authorities would not have provided an adequate or timely remedy.¹ It is very doubtful if deprivation of water by diversion of a river or utilization of its water by a riparian State can justify the use of force by a State affected.²

The difficulty is to provide for such unusual cases of necessity without undermining the policy of the law in regard to self-help and providing excuses for breaches of the peace. However, deliberate employment of natural forces by a State in such circumstances can probably be regarded as a use of force; and preventive action of a technical nature in case of a natural disaster having its origin in a neighbouring State may be treated as a unique type of case in which necessity still excuses. The action should be confined to natural disaster of considerable magnitude since bad faith cannot easily be imputed to the State taking preventive action in such a case.

Very considerable difficulty arises in the case of a land blockade of a sovereign State or part thereof surrounded by the territory of the blockading power.³ 'Land blockade' without any restriction to land-locked victims has appeared in some draft definitions of aggression⁴ but can hardly be said to involve a resort to force since it merely consists in a denial of entry to territory.⁵ It is possible that in this type of case an exception should be made to the general prohibition of forcible self-help but it cannot be stated with certainty that this suggestion represents the law.⁶

¹ Cf. the example in Oppenheim, *op. cit.*, vol. 1, 298, n., of the opening of a lock on a river, situated in another State, to avert dangerous flooding. So, also, with the threat of a forest fire where the forest extends over the frontier.

² However, in face of Israeli plans to divert the river Jordan, the Arab States collectively threatened forcible preventive measures: *The Times*, 30 January and 1 March 1956.

Cf. Kelsen, *loc. cit.*; Griffin, *American Journal of International Law*, 53 (1959), p. 50 at pp. 79-80; and Berber, *Rivers in International Law*, pp. 99-100. The legal context was that of the Armistice Agreement. See also, on the dispute between Bolivia and Chile over use of the waters of the river Lauca, *The Times*, 18 and 21 April 1962.

³ For an example of a coercive blockade: that of San Marino by Italy in 1950-1 (*Daily Telegraph*, 7 January and 14 May 1951). In October 1957 Italian moves to bring about a change of Government in San Marino included a blockade: *The Times*, 8 October 1957. Cf. case *Concerning Right of Passage over Indian Territory (Merits)*, *I.C.J. Reports*, 1960, p. 6; in particular the Dissenting Opinion of Sir Percy Spender at pp. 110-15. On the Berlin crisis: *Repertoire of Security Council Practice*, pp. 354, 361 et seq.

⁴ Report of Secretary-General, A/2211, para. 115; Panama and Iran, draft resolution, A/AC.77/L.9; Report of 1956 Special Committee, *loc. cit.*, p. 31; Mexican draft resolution A/AC.77/L.10, *ibid.*, p. 32 (see also No. 6 on p. 33).

⁵ See, on naval blockade, above, pp. 257-8.

⁶ However, on the doctrine of forcible affirmation of rights, see above, pp. 223-5.

IX. CONCLUSION

Apart from the prominently legal contexts of criminal and delictual responsibility and the function of United Nations organs, two vital aspects of the existing law must be noticed. Representatives of States in examining the question of defining aggression have placed great emphasis on the need to leave States with some freedom of action to maintain their basic right of existence without providing opportunities for abuse. In brief, Governments wish to be able to protect their vital interests without incurring the political difficulties and pressures which a condemnation of a resort to force in legal terms by a large number of States or an international organ may entail. This is the prime concern of Governments, and the jurist is formal and unrealistic in thinking primarily in terms of a judicial process assessing criminal or delictual responsibility. The other factor of importance is the concern of the jurist and of Governments to concede a reasonable right of protection to States without providing facile legal excuses for breaches of the peace and threats to the peace.

These considerations have caused jurists and Governments to place emphasis on the question of determining cases in which resort to force is justified, viz. on the permissions rather than the prohibition. Before an attempt is made to state the existing legal position, some criticism may be offered of certain methods of stating the modern law related in part to the predilection just noted. To approach the subject by way of a list of justifications may lead to an incorrect placing of emphasis since any grounds which may exist for resort to force by individual States must now be regarded as exceptional. A common approach is to assume that the developments since 1920 which qualify the relative freedom of action conferred by 'the customary law' or 'classical law' are exceptional, and that those who assert changes in 'the customary law' bear some sort of *onus probandi*. This attitude leads to a distorted picture of the State practice and an apparent inability to allow for the development of new rules of customary law since 1920, i.e. the end of the era of the 'classical law'. Thus important and very general expressions of the opinions of Governments, including the General Treaty for the Renunciation of War and the United Nations Charter, are said to be subject to 'the customary law'. It is submitted that the State practice since 1920 shows an equal and, very probably, a greater coherence and consistency than the customary law of the earlier period with its generous, vague and contradictory doctrines of self-preservation, necessity and intervention. To regard the customary law as having become static c. 1920 is surely objectionable, especially in the present context, since it is only in the period since the inception of the League of Nations that any effective legal regulation of the use of force has occurred. Furthermore, the

present writer is at issue with certain jurists who employ arguments the logic of which seems to lead to the introduction of the uncertainties of the nineteenth-century doctrines, although unfashionable terms such as 'self-preservation' and 'vital interests' are avoided. Before these arguments are considered it is worth remarking that very few modern writers refer baldly, to the category of 'necessity' as a broad justification in the present context.¹ Moreover, not many writers of the more recent period claim the survival of the whole or substantial parts of the various forms of intervention regarded as permissible in the nineteenth century.² The various modern instruments restricting resort to force have not only failed to reserve customary rights of forcible intervention but in many cases condemned intervention, and, in any case, it is difficult to rationalize the law as the original doctrine is so contradictory.³

The arguments of certain jurists writing on the use of force in the very recent past do not rest upon the categories of 'necessity' or 'intervention' but rely upon the concept of self-defence. The right of self-defence is stated in terms of the tests laid down by Webster in the correspondence relating to the *Caroline* incident, but there is no reference to other criteria, e.g. the necessity for the existence of a resort to force by another State against the State purporting to act in self-defence.⁴ Yet in the correspondence self-defence was equated with self-preservation and Webster's test is primarily verbal: it deals with a question of degree and in fact merely states that Governments should exercise their discretion to act in defence of their vital interests with caution.⁵ In isolation, Webster's test is no more informative than the crude formula that there must be a necessity to act; there is the advice that there must be a necessity to act in self-defence but no definition of the latter concept. Webster's formula is exceptionally

¹ Some exceptions: François, *Recueil des cours*, 66 (1938—IV), pp. 182–3. Cf. Basdevant, *ibid.* 58 (1936—IV), pp. 551–5, *contra*.

² Some books and dissertations with a doctrinal emphasis have continued to be based upon the nineteenth-century doctrines of intervention. See Widmer, *Der Zwang im Völkerrecht* (1936), pp. 91 et seq.; Mosler, *Die Intervention im Völkerrecht* (1937); Glock, *Das Interventionsrecht* (1930); Bockhoff, *Die Intervention im Völkerrecht* (1935) (highly doctrinal and political with many citations of Hitler and Carl Schmitt); Ekelof, *Om interventionsgrunden* (1937) (not available); Trollet, *Essai sur l'intervention en droit international public* (1940); and Vonlanthen, *Die völkerrechtliche Selbstbehauptung des Staates* (1944). Cf. Bowett, *Self-defence in International Law*, pp. 14, 91: he is very cautious here in his view of the effect of the United Nations Charter on the legality of intervention but later (p. 273) expresses the unqualified view that a general right of intervention is inconsistent with the system of the Charter.

³ Cf. Zannini, *Studi nelle scienze giuridiche e sociali* (Pavia, 1950), vol. 31, pp. 1–44 at pp. 26–27.

⁴ The following jurists have adopted this approach: Brierly, *Recueil des cours*, 58 (1936—IV), p. 128, and in *The Law of Nations* (5th ed.), pp. 315–16; Waldock, *Recueil des cours*, 81 (1952—II), pp. 463–4 (cf. pp. 466–7); Bowett, *op. cit.*, pp. 58–60, 142, 143, 144, 189, 269; Politis, speech in the League Assembly, 7 December 1932, *League of Nations Official Journal*, Spec. Suppl. No. III, pp. 44–45.

⁵ Cf. Memorandum on Régime of the High Seas presented to the I.L.C. by the Secretariat, A/CN.4/32; *I.L.C. Yearbook* (1950—II), p. 67 at p. 71 (paras. 20–22); McDougal and Feliciano, *Yale Law Journal*, 68 (1958–9), p. 1132.

elastic and necessarily permits anticipatory self-defence. Moreover, in the submission of the present writer to rely on it is to ignore the actual development of the State practice since 1920.

Another approach to the problem of determining the content of self-defence is to admit by implication that States cannot maintain by force any interests considered to be vital by the State concerned and to attempt to define those interests which may be legitimately protected. This is a sound method providing some degree of precision is attained and the result has a reasonably close relation to the State practice. Dr. Bowett has enumerated certain 'essential' substantive rights¹ which in his opinion may be protected by force: The Right of Territorial Integrity; The Right of Political Independence; The Right of Protection over Nationals; and Certain Economic Rights. He emphasizes the flexibility of his position, which is based on a theory of the relativity of rights and which permits the use of force against 'economic or ideological aggression'.² With respect it is thought that his list of 'essential rights' is arbitrary and vague and that this concept of the defence of certain ill-defined essential rights is in the last resort very similar to the concept of self-preservation.³ His criterion for the legality of force in reaction to a threat or a delict not involving force is the need for proportionality, but this leads to the objections related in the preceding paragraph. Much more open to criticism than the views of Dr. Bowett are formulations which permit the use of force in 'defence of legal rights',⁴ usually with reference to certain passages in the Judgment of the Court in the *Corfu Channel* case (*Merits*). It is submitted that such a doctrine involves a virtual renunciation of all the developments in the law since 1920 and a return to a broad permission for self-help. Moreover, it is doubtful if the Court intended to sanction such a doctrine. The vital point is that at the time of a forcible 'defence' or 'affirmation' of legal rights, the very existence of the rights is in dispute and any determination of their existence leading to action will be unilateral and provisional.

The modern law relating to the use of force in self-defence is represented, in the submission of the present writer, by the major proposition that the beginning of an armed attack is a condition precedent for resort to force in self-defence. Anticipatory self-defence is unlawful; an attack must have commenced. Further, the attack must be directed against the State territory

¹ Op. cit., pp. 269-70. See also *ibid.*, pp. 24, 53-54, 109-10.

² See *ibid.*, p. 24.

³ The same objections are thought to apply to the concept of 'principle of self-protection' propounded by Professor Waldock, *loc. cit.*, pp. 461, 464-7, 503. Self-protection is apparently used as a synonym for self-defence. Cf. Basdevant, *Recueil des cours*, 58 (1936-IV), p. 546. See also McDougal and Feliciano, *loc. cit.*, p. 1139.

⁴ See Schwarzenberger, *Recueil des cours*, 87 (1955-I), p. 339 (but see also the more cautious treatment in this writer's *Report on Some Aspects of the Principle of Self-defence in the Charter of the United Nations*, *International Law Association*, New York Conference 1958, pp. 22-24, 36-40); and Waldock, *loc. cit.*, pp. 463-4, 499, 502-3 (referring to the 'forcible affirmation of legal rights').

and territorial waters, with superjacent airspace, or ships and aircraft under protection of the State (if these are attacked on or over the high seas). It follows that forcible intervention to protect the lives and, or, property of nationals is not lawful as self-defence, and the modern legal régime may well be considered to render such action unlawful even if it is characterized as a special right of intervention quite apart from the category of self-defence. The position here outlined depends on the General Treaty for the Renunciation of War and Article 2, paragraph 4, and Article 51 of the United Nations Charter, and the latter provisions are considered to represent general international law in view of the special position of the Charter, the universality of the United Nations Organization, and the general influence of the relevant provisions of the Charter on recent State practice, including the practice of States not members of the United Nations.

Easy though it is to present the main features of the law in a few sentences, verbal formulas will rarely provide clear guidance in every situation. It remains difficult to define 'attack'. Moreover, the principle of proportionality, which is innate in any genuine concept of self-defence, has certain dangers and ambiguities attendant on it. Again, while it is thought to be a general rule that a use of force in self-defence can be only a reaction to an unlawful use of force, there remain certain cases of necessity, which must be accommodated, arising from natural catastrophe and land blockade. However, the occurrence of the exceptional and difficult cases must not obscure the viability of the principal rules. Anomalies based on the teachings of experience and the uneven development of the various parts of the law are bound to arise. Perhaps the most troublesome is the use of force by belligerents to prevent or terminate breaches of neutrality. On occasion this has been classified as self-defence¹ and interventions on this ground were not uncommon during the Second World War.² The practice may be regarded as anomalous but nevertheless lawful,³ or it may be thought that it

¹ By the International Military Tribunal at Nuremberg, *Judgment*, Cmd. 6964, pp. 28-30, 31. See also Verdross, *Recueil des cours*, 30 (1929-V), p. 487.

² Some of these were almost certainly unlawful as exceeding the permissible limits of the putative right of intervention. In other cases it is probable that the action could be regarded as lawful if the neutral territory was already under effective control of the opposing belligerent. The following instances occurred: British occupation of Iceland, 10 May 1940, *Trial of Major German War Criminals*, H.M.S.O., Part 19, p. 59; Italian ultimatum to Greece, 28 October 1940, *Royal Greek Ministry of Foreign Affairs, The Greek White Book* (1942), No. 178, p. 117; Anglo-Soviet operations in Iran, 25 August 1941, Kirk, *Survey of International Affairs, 1939-1946, The Middle East in the War*, pp. 129-41; the Altmark incident, on which see Waldock, *this Year Book*, 24 (1947), p. 216; British operations in Syria (1941) and Madagascar (1942) (then under Vichy Administration), *Survey of International Affairs, 1939-1946, Hitler's Europe* (ed. by A. Toynbee and Veronica M. Toynbee, 1954), pp. 451-6, 466-9. On German justifications for invasions of the Low Countries and Scandinavian States: *Judgment of the International Military Tribunal at Nuremberg*, loc. cit., and see also Ross, *Jus Gentium* (Copenhagen), 1 (1949), p. 3.

³ In support of its legality: Tucker, U.S. Naval War College International Law Studies, *The Law of War and Neutrality at Sea* (1955), pp. 261-2; Waldock, loc. cit., pp. 235-7; Stone, *Legal Controls of International Conflict*, p. 401; Hyde, *International Law*, vol. 3, pp. 2337-40;

cannot stand with the legal developments of the modern period as its content is vague and harks back to the older doctrines of self-preservation and necessity.¹

Guggenheim, *Traité*, vol. 2, pp. 346, 529, n. 1; Bowett, *op. cit.*, pp. 172-4; McDougal and Feliciano, *Yale Law Journal*, 68 (1958-9), pp. 1129-30.

¹ Cf. Castren, *The Present Law of War and Neutrality*, p. 463; MacChesney, U.S. Naval War College, *International Law Situation and Documents* (1956), vol. 51, p. 26. See also Hague Convention V of 1907, Article 1, Scott, *The Hague Conventions* (3rd ed.), p. 133. This form of self-help is classified as self-preservation by Hall, *International Law* (8th ed.), pp. 325-7; Westlake, *Collected Papers* (1914), pp. 120-1; and Stowell, *Intervention in International Law* (1921), pp. 405-14.

THE LEGAL LIMITS TO THE USE OF FORCE BY SOVEREIGN STATES UNITED NATIONS PRACTICE*

2nd edition 1990 By ROSALYN HIGGINS¹

THE legal limits of the use of force by sovereign States ranks among the most important and the most controversial problems of international law. The basic rule—that force may not be used aggressively, but only in self-defence, is too broad to be of much guidance. All the details remain unclear: it is uncertain what is covered by the terms ‘aggression’ and ‘self-defence’; it is often difficult to ascertain whether in fact the circumstances in which these terms are applicable have arisen; and it is a subject of some dispute whether force is ever permitted for other than purely defensive purposes. A very valuable source of information is the practice of the United Nations, providing as it does a body of material representing the actions of States faced with political and military problems, yet bound, under the terms of the Charter, by legal rules.² Such actions, practised by the great majority of States over a period of some sixteen years, may throw some light on uncertain areas of international law and reveal new trends and developments.

To decide in a given case whether a sovereign State has exceeded the legal limits of the use of force, it is necessary not merely to select certain relevant topics for discussion—such as analysis of articles of the Charter,³ problems of defining aggression, self-defence, and intervention,⁴

* © Rosalyn Higgins, 1962.

¹ Junior Fellow in International Studies at the London School of Economics and Political Science. The author wishes to express her gratitude to the Rockefeller Foundation for a grant for research. Part of this study is based on materials submitted for the degree of J.S.D. at Yale University; and the article is adapted from a book under preparation for the Royal Institute of International Affairs on *The Development of International Law through the Political Organs of the United Nations*.

² Some references which frequently occur in this article have been abbreviated as follows: S.C.O.R. = *Security Council, Official Records*; G.A.O.R. = *General Assembly, Official Records*; O.A.S. = *Organization of American States*; I.L.C. = *International Law Commission*; U.N.C.I.O. = *Documents of the United Nations Conference on International Organization*.

³ Kelsen, *The Law of the United Nations* (1950); ‘Collective Security and Collective Self-defence under the Charter of the United Nations’, *American Journal of International Law*, 42 (1948), p. 783; Goodrich and Simons, *The Maintenance of International Peace and Security* (1959); Kunz, ‘Individual and Collective Self-defence under Article 51 of the Charter’, *American Journal of International Law*, 41 (1947), p. 872; Salomon, *L’ONU et la paix* (1948); Waldock, ‘The Use of Force by Individual States in International Law’, *Recueil des cours*, 2 (1952), p. 455; Wehberg, ‘Interdiction du recours à la force’, *ibid.* 1 (1951), p. 7.

⁴ Fitzmaurice, ‘The Definition of Aggression’, *International and Comparative Law Quarterly*, 1 (1952), p. 137; Kunz, ‘Bellum Iustum and Bellum Legale’, *American Journal of International Law*, 45 (1951), p. 528; Pompe, *Aggressive War—an International Crime* (1953), p. 56; Roling,

observations on the rules of warfare,¹ and studies of United Nations action in previous cases²—but to relate all these facets of the problem to each other. When a dispute involving the use of force arises between two sovereign States, and is brought before the United Nations, these factors in actual fact arise in the form of arguments supporting claims about the legality or illegality of the action. It is proposed here to examine the claims most usually heard. No one argument is conclusive; its merit can only be assessed in relation to all the other factors which emerge. There can be no avoiding the interpretive decision involved. However, by studying the reaction of the United Nations to various legal arguments supporting the charge of illegality or assertion of legality, it is possible, even given this discretionary—and highly political—element, to obtain guidance on some of the complexities surrounding the legal limits of the use of force.³

This article is concerned only with the use of force between sovereign States, acting individually or jointly,⁴ when the issue is brought before the

'On Aggression, on International Criminal Law, on International Criminal Jurisdiction', *Nederlands Tijdschrift voor Internationaal Recht*, 2 (1955), p. 167; Stone, *Aggression and World Order* (1958); Tucker, 'The Interpretation of War', *International and Comparative Law Quarterly*, 4 (1951), p. 11.

¹ Castren, *The Present Law of War and Neutrality* (1954); Stone, *Legal Controls of International Conflict* (1958), pp. 297–727; Kotzsch, *The Concept of War in Contemporary History and International Law* (1956).

² Brown, 'Chinese Representation, a Case Study in U.M. Political Affairs', *Woodrow Wilson Foundation Pamphlets* (1955), pp. 11–30; Eagleton, 'Hyderabad before the Security Council', *American Journal of International Law*, 44 (1950), p. 277; Potter, 'Legal Aspects of the Beirut Landing', *ibid.* 52 (1958), p. 727; Wright, 'United States Intervention in the Lebanon', *ibid.* 53 (1959), p. 112; *id.*, 'Intervention 1956', *ibid.* 51 (1957), p. 257; Taylor, *Indonesian Independence and the United Nations* (1960); Goodwin, 'The Role of the United Nations in World Affairs', *International Affairs*, 34 (1958), p. 25; Hoffman, 'The United Nations, Egypt and Hungary', *International Organization*, 11 (1957), p. 446; Perkins, 'Sanctions for Political Change—the Indonesian Case', *ibid.* (1958), p. 26; Vali, 'The Hungarian Revolution and International Law', *Fletcher Review*, vol. 2, no. 1.

³ The author acknowledges her indebtedness to a series of articles by McDougal and Feliciano: 'The Initiation of Coercion: a Multi-temporal Analysis', *American Journal of International Law*, 52 (1958), p. 241; 'International Coercion and World Public Order: the General Principles of the Law of War', *Yale Law Journal*, 67 (1958, 771; and 'Legal Regulation of Resort to International Coercion: Aggression and Self-defence in Policy Perspective', *ibid.* 68 (1959), p. 1057. This article assumes certain conclusions reached in the above articles, perhaps the most important of which is the necessity of a 'multi-factor analysis' in approaching problems relating to the use of force. Whereas the primary function of the cited articles is to present a method of inquiry, the aim of the present article is to apply such an analysis to specific case studies in United Nations practice.

⁴ Articles 52–54 of the Charter. There has been virtually no practice in this category. In the Palestine question, in connexion with the hostilities which broke out immediately after the declaration of the State of Israel, the representative of Syria stated that the intervention of the Arab States in Palestine had been taken in conformity with Article 52 of the Charter. He contended that Palestine was an associate member of the Arab League, which constituted a regional arrangement, and referred to Article 52 (2) as authorizing the Arab League to pacify the local dispute in Palestine, *S.C.O.R.*, 2nd year, 299th meeting. The United States argued that Article 52 provided no justification, because Article 53 allowed no enforcement action to be taken under regional arrangements without the authorization of the Security Council. Further, that part of Palestine which was under the *de facto* Government of the Provisional Government of Israel could not be said to be part of a regional organization; *ibid.*, 302nd meeting. On 5 Septem-

United Nations. The case may have occurred through threats of force;¹ or border incidents;² or coercion used to effect or block governmental changes;³ or the violent acquisition of territory.⁴ All of these fall short of overt war aimed at total assimilation or annihilation. The facts involved in an outbreak of violence, and the reasons for the decisions taken, are too complex to be solved by abstract definitions of aggression;⁵ and the com-

ber 1960 the U.S.S.R. charged that under Article 53, the condemnation by the Organization of American States of aggressive acts committed by the Dominican Republic against Venezuela, and the (non-military) sanctions which it proposed (U.N. Doc. S/4476) required the approval of the Security Council (U.N. Docs. S/4477, S/4481). The Security Council approved a resolution (U.N. Doc. S/4491) by which it 'took note' of the Report of the Final Act of the 6th meeting of the Ministers of Foreign Affairs of the O.A.S.

Regional arrangements are closely controlled by the Security Council under Articles 52-54, which fall under Chapter VIII. Self-defence under Article 51, falling under Chapter VII, is immune from the veto, and multilateral alliances have tended to be formed as 'collective self-defence arrangements' rather than as agencies; e.g. the Treaty of Dunkirk, the Brussels Treaty, the Inter-American Treaty, N.A.T.O. and the Warsaw Pact are all based on Article 51. On this point, see Waldock 'The Regulation of the Use of Force by Individual States in International Law', *Recueil des cours*, 2 (1950), at p. 504. On the historical ties between the drafting of Article 51 and the Pan-American system, see Russell and Muther, *A History of the United Nations Charter* (1958), pp. 703-6.

¹ The Czechoslovakian question, *S.C.O.R.*, 3rd year, 268th meeting, and U.N. Doc. S/694, *S.C.O.R.*, 3rd year, Suppl. for January-March; the Berlin blockade, *S.C.O.R.*, 3rd year, 361st-364th, 368th, 370th meetings, U.N. Docs. S/1020, and Add. 1, *S.C.O.R.*, 3rd year, Suppl. for Sept., and S/1048. The first Cuban charges against the United States were couched in terms of a threat of force, *S.C.O.R.*, 15th year, 874-876th meetings. See also Jordanian complaint of a military parade to be held in the Israeli sector of Jerusalem, 20 April 1961, *S.C.O.R.*, 16th year, 947th-949th meetings.

² Much of the Palestine question has been concerned with frontier incidents, e.g. S/3139/rev.2, *S.C.O.R.*, 8th year, Suppl. for October-December, p. 8, and *S.C.O.R.*, 10th year, Suppl. for January-March, pp. 95-96. See also Tunisian complaints of French aggression in 1958, *S.C.O.R.*, 13th year, 811th, 819th-821st, 826th meetings.

³ E.g. the Czechoslovakian question, *S.C.O.R.*, 3rd year, 268th, 272nd-273rd, 276th-278th, 288th, 300th-303rd, 305th meetings; Laotian question (1959), *S.C.O.R.*, 14th year, 848th meeting, U.N. Doc. S/4212, S/4216, *S.C.O.R.*, 14th year, Suppl. for July-September, S/4236, *ibid.*, Suppl. for October-December; Korean conflict, *S.C.O.R.*, 5th year, 473rd-474th meetings; Guatemalan question, *S.C.O.R.*, 9th year, Suppl. for April-June, pp. 11-13, S/3232; Cuban complaints against U.S.A., General Assembly Resolution 1616 (XV), 21 April 1961; Lebanon question, *S.C.O.R.*, 13th year, 818th-838th meetings; and *G.A.O.R.*, 3rd emergency special session, 733rd-446th meetings.

⁴ E.g. the Kashmir-Jammu dispute, *S.C.O.R.*, 3rd year, 284th-286th, 366th, 382nd meetings; Hyderabad question, *S.C.O.R.*, 3rd year, Suppl. for September, S/986.

⁵ The problem of defining aggression has been beset with difficulties at every level, including whether in fact a definition was desirable or possible, what the best approach to definition was, and the detailed contents of any selected method. The question has been considered, unsuccessfully, by the First and Sixth Committees of the Assembly, by two special committees on defining aggression (1953 and 1956), and by the International Law Commission. The question was eventually deferred. Three main approaches were offered by those who thought definition useful: (i) an enumerative method, listing acts which would be aggressive if committed first. This method was propounded by the U.S.S.R. based on the London Conventions for the definition of aggression, 1933: *League of Nations Treaty Series*, vol. 14, pp. 66, 69, n. 2; and the *Politis Report to the 1933 Geneva Disarmament Conference*, D/C-G 108 (*League of Nations Publications*, vol. 4 (1935), pp. 679-90). In its final form it included a list of acts which were not to be considered aggression, and a list of conditions which did not justify any of the acts listed as 'aggressive': U.N. Doc. A/AC. 77/L.4 (1956); and U.N. Doc. A/3574, *Report of the 1956 Special Committee*, *G.A.O.R.*, 12th session, Suppl. No. 16, at pp. 31-33 (1957); (ii) an abstract and general formula, aimed at covering all possible instances of aggression. Its supporters claimed that this

plexity extends beyond merely aiming at characterizing the situation as 'war' or 'peace',¹ or even as the increasingly fashionable *status mixtus*.²

The inevitable interpretive decision demanded of the organs of the method, unlike the enumerative method, would not allow aggressive acts to be excluded through oversight or inability to foresee new forms of aggression. See, for example, U.N. Docs. A/CN.4/L.31 at p. 27 (1951); A/CN.4/L.6 (1951); A/CN.4/L.10 (1951); (iii) the most popular method suggested was that of a 'mixed definition' comprising a general statement explained by a list of examples, thus avoiding too great abstraction or too restrictive listing: *Report of 6th Committee, G.A.O.R.*, 12th session, Annexes, agenda item 54, para. 21 (1957). For example, see Iran-Panama definition, *Report of the 1956 Special Committee*, loc. cit., at p. 31. See also *Report of the 1953 Special Committee*, U.N. Doc. A/AC.66/L.11 (1953); *Report of Secretary-General on Question of Defining Aggression*, U.N. Doc. A/2211, *G.A.O.R.*, 7th session, Annexes, agenda item 54; *Report of 6th Committee*, Annexes, agenda item 51 (1954); *Report of 6th Committee, G.A.O.R.*, 12th session, Annexes, agenda item 54 (1957); *Comments of Governments to the Security Council*, U.N. Doc. A/2162; *Report of I.L.C. on its 3rd Session*, U.N. Doc. A/1858, and Sixth Committee discussions thereon, A/C.6/SR.278-95. For a useful brief summary see McDougal and Feliciano, 'Legal Regulation of Resort to International Coercion . . .', *Yale Law Journal*, 68 (1959), pp. 1074-8; and for a very comprehensive survey and comments, Stone, *Aggression and World Order* (1958), pp. 22-77.

¹ Under the Covenant of the League of Nations there was no obligation to renounce war, though resort to it, under the concept of *bellum justum*, was closely regulated. Article 12 of the Covenant stipulated that members were not to resort to war until three months after the award by the arbitrators or the judicial decision or the Report by the Council which had been ordered. Resort to war was forbidden against any member which had complied with such award or judicial decision (Article 13, paragraphs 1 and 4); and in respect of disputes not submitted to arbitration or judicial decision, but to an inquiry and settlement by the Council, they agreed not to go to war with any party to the dispute which complied with the recommendations of the Council (Article 15, paragraphs 1, 3 and 6), if the report had been agreed to unanimously by those Council members who were not parties to the dispute. The Charter, preferring to deal with 'resort to force' rather than 'resort to war', both aims at control of violence even if short of war, and manages to avoid the preoccupation with the meaning of 'war' which beset the League. See Eagleton, 'The Attempt to Define War', *International Conciliation*, 291 (1933), p. 273. Historical summary of the death of the notion of 'just war' will be found in McDougal and Feliciano, loc. cit., pp. 1065-8; Green, op. cit., pp. 394-400; Waldock, loc. cit., p. 455; and Kunz, '*Bellum Iustum and Bellum Legale*', *American Journal of International Law*, 45 (1951), p. 528. The demise of the traditional distinction between 'war' and 'peace' was greatly speeded (as is pointed out by Pompe, *Aggressive War—An International Crime* (1953), at p. 33) by the Tokyo Tribunal, whose findings of war situations were so broadly stated that 'the only conclusion that can be drawn from the Tokyo Judgement is that in the case of a mere threat of force or in the absence of all signs of resistance or disapproval on the part of the government in whose territory the troops have entered, there can be no question of war'. In the Charter the term 'war' is used only in relation to the past: see Article 107. Nor can the enforcement actions of the United Nations be referred to as 'war', which term implies bilateralism. Whether or not the rules and customs of military warfare apply to collective sanctions under the U.N. (and the present writer would answer in the affirmative) is a quite different question: on which see Lauterpacht, 'The Limits of the Operation of the Law of War', this *Year Book* 30 (1953), p. 206; and Jessup, *A Modern Law of Nations* (1948), pp. 188 et seq.

² Jessup, 'Should International Law recognize an Intermediate Status between Peace and War?' *American Journal of International Law*, 48 (1954), p. 98; Grob, *The Relativity of War and Peace* (1949); Schwarzenberger, '*Jus Pacis ac Belli*', *American Journal of International Law*, 37 (1953), p. 460; Stone, *Legal Controls*, &c., p. 297; Tucker, 'The Interpretation of War', *International and Comparative Law Quarterly*, 4 (1951), p. 11. Cf. Kotsch, *The Concept of War in Contemporary History and International Law* (1956), at p. 241, who regards such a doctrine a tending to degenerate 'legal thinking . . . into political arbitrariness'. The present writer finds herself more in sympathy with the dissent of McDougal and Feliciano, *Yale Law Journal*, 67 (1958), p. 778, who state that 'a method of analysis more comprehensive and flexible than either dichotomy or trichotomy seems necessary if clarity in fundamental conceptions and rationality in decision-making are to be promoted'. See also 'Peace and War: Factual Continuum with Multiple Legal Consequences', *American Journal of International Law*, 49 (1955), p. 63.

United Nations in assessing the comparative merits of the claims before them is made the more arduous by the difficulty in applying in reality the concept of peaceful change. On the one hand, there is the necessity of a stable, peaceful society, with the dangers inherent in violent changes of the *status quo* more apparent than ever.¹ On the other hand, a flexible, progressive society of nations is required, adaptable to new ideas and free to shake off existing injustices.² Before the United Nations the problem of peaceful change has arisen most sharply in colonial and peace-treaty issues,³ and frequent use has been made of Article 14 in dealing with such matters.⁴

The basic obligation to refrain from the use of force in international relations is to be found in Articles 2 (4) and 51 of the Charter. Chapter VII provides the Security Council with the basis of authority for ascertaining 'threats to the peace, breaches of the peace, and acts of aggression' and for applying measures to terminate them.⁵ It is common knowledge that the detailed provisions planned in Articles 43-47 have proved abortive.

¹ Dunn, in 'Peaceful Change Today', *World Politics*, 11 (1959), pp. 278-79, notes that 'the destructiveness of nuclear weapons is out of all proportion to any political gains that might be achieved by war. There is no certainty that even mild forms of coercion would not eventually lead to their use.' However, his ensuing statement, '... change through resort to forceful measures has in most cases become entirely too dangerous to contemplate', would seem to require some qualification. Algeria, Laos, South Vietnam and Angola belie this assertion and certainly there are many areas in which the protagonists feel that guerrilla warfare is very unlikely to lead to the use of nuclear weapons. The development of these new weapons has altered the strategic value of particular territories, and with them the attitudes of interested nations towards claims for changing their status.

² This concept finds expression in Article 73, which refers to non-self-governing territories, and aims to 'develop self government, to take into account the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions'. See also General Assembly, Resolution 1514 (XV) on the granting of independence to colonial countries.

³ Bloomfield, *Evolution or Revolution?* (1957), at p. 119, cites twenty-two items relating to the process of peaceful change in the United Nations. Some of them are so far removed from 'peaceful change'—such as Suez and Hungary—that to include them under this head seems whimsical. It is equally curious that Bloomfield does not mention the complaint by Yugoslavia of hostile acts by certain governments (*G.A.O.R.*, 6th session, Annexes, agenda item 68, U.N. Doc. A/1946, and Resolution 509 (VI), especially paragraph 2 (c)), nor the question of the treatment of Indians in South Africa (for summary see *Repertory of Practice of U.N. Organs*, vol. 1, pp. 473-5, and Suppl. No. 1, p. 171)—though both of these were specifically raised in terms of problems of peaceful change.

⁴ Unlike Article 19 of the Covenant of the League of Nations, Article 14 of the Charter omits any direct mention of the possible revision of peace treaties. The phrase 'regardless of origin', however, assures its inclusion in the scope of the article. The issue arose in specific form with the inclusion of the item 'Suggestions to the countries concerned with the Peace Treaty with Italy' in the agenda of the 2nd session of the Assembly: *G.A.O.R.*, 2nd session, First Committee, Annex 3 (A/361), Annex 6 (A/379); General Committee, 38th meeting; and plenary, 90th and 91st meetings. Article 19 of the Covenant was in fact never invoked successfully for the revision of any aspect of the peace settlements.

⁵ This dual function, in the broadest context, is aptly commented on by McDougal and Feliciano, *Yale Law Journal*, 67 (1958), at pp. 778-9: 'An adequate theory for the analysis of practices and decisions must start with manageable conceptions of, and a careful distinguishing between, the factual process of international coercion and the process of authoritative decision by which the public order of the world community endeavors to regulate such process of coercion.' This article only purports to deal with decisions as to the permissibility or impermissibility

The Security Council may thus be concerned with controlling violence even when the violence does not amount to an 'aggression'. Nowhere in the Charter are the terms 'threat to the peace, breach of the peace or acts of aggression' defined¹—nor is the relationship of this article to the terms of Article 2 (4) made explicit—though it may be assumed that the 'threat or use of force against the territorial integrity or political independence of a state in any manner inconsistent with the purposes of the United Nations' may, under the discretion deliberately left to the Security Council,² be classified as either a 'threat to the peace, breach of the peace or act of aggression'. Moreover, practice has shown that not only has lack of a definition of aggression proved no impediment to action by the Council when the issues were clear cut and unequivocal,³ but that the Council has in fact dealt with situations in which the degree and extent of violence was considerable, without even classifying it as any one of the situations listed in Article 39.⁴ It may, of course, be said that the Security Council has dealt

of the use of force, and not with *ex post facto* measures for containing or punishing an illegal use of force.

¹ The preoccupation of the United Nations with finding a definition for this last term has been commented on above, p. 271, n. 5. Among others urging *a priori* definitions of the first two terms, Professor Quincy Wright has suggested that a breach of the peace exists 'wherever hostilities occur between armed forces controlled by governments *de facto* and *de jure*, on opposite sides of an internationally recognized frontier', *American Journal of International Law*, 50 (1956), at p. 542; and a threat to the peace 'occurs when, because of a declaration of war, of intervention, or other hostile intent by the government of a state against another state, or because of the magnitude of civil strife within a state, there is immediate danger of breach of the international peace', *ibid.*, at p. 525. Of interest here is the distinction drawn by the Security Council Report on the Spanish question, which stated that while the régime did not constitute an existing threat to the peace within the meaning of Article 39, it was a 'potential menace to international peace' within the meaning of Article 34, and as such the situation was of international concern and not essentially within Spain's domestic jurisdiction. *S.C.O.R.*, 1st year, 1st series, Special Suppl. (revised edit.), pp. 1-2, 8-9. The line between 'threat to the peace' and 'potential menace to international peace' has been blurred in recent cases in which resolutions have been passed on issues that might otherwise have been beyond the Security Council's jurisdiction as pertaining to domestic jurisdiction. Thus the Security Council, in its latest resolution on apartheid in South Africa stated, in paragraph 1, that 'the situation in the Union of South Africa is one that has led to international friction and if continued might endanger international peace and security', *S.C.O.R.*, 16th year, Resolution S/4300. It cited no specific article. See also General Assembly Resolution 1603 (XV) on Angola. Such situations seem to be covered by Articles 34 and 14.

² The Third Committee at San Francisco decided 'to leave to the Council the entire decision as to what constitutes a threat to the peace, a breach of the peace, or an act of aggression'. *Report of the Rapporteur of Committee 3 to Commission III, U.N.C.I.O.*, vol. 12, p. 505. See also Russell and Muther, *A History of the United Nations Charter* (1957), pp. 669-72. There is evidence, however, that the intention of the drafters of the Charter was not to allow the Council a broad discretion as to whether or not to apply enforcement measures, once it was apparent that aggression had occurred. Such discretion was meant to apply only to threats to the peace or breaches of the peace. *U.N.C.I.O.*, vol. 12, p. 507.

³ Thus in the Korean case the Security Council Resolution S/1501 of June 1950 determined that 'the armed attack upon the Republic of Korea by forces from North Korea constitutes a breach of the peace'. On 27 June, in Resolution S/1511, a finding of an 'armed attack' was made, together with a recommendation that U.N. Members furnish assistance to repel it; and in General Assembly Resolution 498 (V) of 1 February 1951, China was condemned as an aggressor.

⁴ In the Indonesian question, the resolutions of the Security Council referred repeatedly to 'hostilities' and even to 'the restoration of good relations between the parties' and a 'just and

with these problems under its role in Chapter VI (the pacific settlement of disputes) in so far as enforcement measures were not involved—even though in argument repeated reference was made by the parties to Article 39.¹

Further, it may be noted that a breach of the peace or a threat to the peace may occur through acts which are in no way illegal: the Security Council, under its authority as the preserver of international peace and security, may deal with the case and even order enforcement measures to ensure compliance with its decisions.² Thus the term 'permissible and impermissible uses of force' is perhaps more accurate than 'legal and illegal uses of force'.

The competence of the Security Council is founded in Articles 24 and 25, the more specific measures originally envisaged under Articles 43–47 having failed to be substantiated.³ Under the Uniting for Peace Resolution the General Assembly asserts its authority when the Security Council is unable to discharge its responsibilities because of the negative vote of a permanent member.⁴ It should also be noted that recourse is had at various stages and for various tasks to subsidiary bodies of both these organs, in the form of subcommittees, fact-finding groups, commissions of inquiry and so forth.⁵

lasting settlement', but at no time to any of the terms of Articles 2 (4) or Article 39. See S/459, 1 August 1947; S/597, 3 November 1947; and S/1234, 28 January 1949.

¹ The Australian application to the Security Council in the Indonesian case termed the hostilities 'a breach of the peace' under Article 39. S/449, 30 July 1947.

² Though possibly the power of coercion of the Security Council is limited to maintaining or restoring the peace, and does not extend to enforcing its own settlement on the merits of the dispute. For views on this point, see Waldock, *Law Quarterly Review*, 68 (1952), at p. 420; and Goodrich and Hambro, *The Charter of the United Nations* (2nd ed., 1949), at p. 264. See also Hoffmann, 'The United Nations, Egypt and Hungary', *International Organization*, 11 (1957), vol. 3, p. 454, who states that in reality the keeping of the peace and the restoration of the *status quo* become synonymous; and cites as evidence the fact that the Secretary-General refused to permit Israel's withdrawal from Egypt to be accompanied by guarantees over closely related issues. The Secretary-General stated that his proposals tended to restore the *status juris*, not the *status quo*. Hoffmann justly observes that the line is fragile, and that the *status juris* in this case is a matter of some conjecture. See also the statement by Dr. Belaunde of Peru during the debates on Suez: 'It is a principle hallowed by United Nations jurisprudence and American law that when there is a border incident, the *status quo* should be restored.' *S.C.O.R.*, 11th year, 748th meeting at p. 9. The dynamic role of the Security Council in this context becomes apparent, and Kelsen has observed that 'since peace is not necessarily identical with law, the enforcement machinery established by the Charter is no guarantee for the maintenance or restoration of existing law: but it may create a new law'. *American Journal of International Law*, 42 (1948), at p. 789.

³ The interesting argument is made by Tucker, 'The Interpretation of the Law of War', *International and Comparative Law Quarterly*, 4 (1951), pp. 27–28 that it was never seriously expected that these articles would be implemented. For support of this view see Brierly, *The Law of Nations* (4th ed., 1949), pp. 282–3.

⁴ *G.A.O.R.*, 5th session, Suppl. No. 20, Resolution 377 (V). A two-thirds majority suffices. For discussion on the legality of this resolution, see Tucker, loc. cit., pp. 33–38. This writer prefers those views which regard the resolution as legal; and is further of the opinion that such discussion has become academic—the resolution has now been invoked both by East and West in referring disputes from the Council to the Assembly: see *S.C.O.R.*, 13th year, 835th meeting, U.N. Docs. S/4051 and S/4056, *re* the Lebanon case.

⁵ Commissions or subcommissions may be appointed for the elucidation of facts: e.g. the Greek frontier incidents question, U.N. Doc. S/339, 19 December 1946; or for supervision or

It is within the context of the legal authority above described that claims are made before the United Nations by the parties involved; and it is now proposed to examine those claims.

A. WHERE ONE PARTY IS CLAIMING AN ILLEGAL USE OF FORCE BY ANOTHER
THE FOLLOWING ASSERTIONS MAY BE HEARD

(i) *That there has been a use of force*

The range of coercion varies from very minor coercion to major and unrestrained violence. There is a tendency for intensive coercion to occur primarily through military means, though often accompanied by propaganda and by diplomatic and economic pressures. Minor coercions may not even involve the use of force at all: or may involve it only in a very low degree. In endeavouring to answer the question 'What does United Nations practice show us about the rules of international law governing the use of force?', one is immediately presented with the companion question 'What is force?' We would suggest that at least it excludes slight non-military coercion. Minimal economic and diplomatic coercion is probably inevitable in any non-Utopian system of sovereign States. Fairly slight coercion may be brought about by any of these means; but, provided it is kept at a low level, it is an illegality rather than an aggression: it is not an international crime,¹ but an international tort.² A remedy may be available but it is not the remedy of the designation of such acts as an illegal use of force, which is subject to self-defence or community sanctions.

There is a certain body of opinion which regards a very high degree of economic coercion as tantamount to a use of force, thus carrying with it the right to forceful, i.e. military, self-defence.³ Certainly it is arguable that

observation in connexion with the termination of hostilities: e.g. in the Indonesian question, U.N. Doc. S/1142, *S.C.O.R.*, 3rd year, Suppl. for December, S/1145, 24 December 1948; or for good offices, mediation or conciliation, e.g. India-Pakistan question, U.N. Doc. S/726, 21 April 1948. *S.C.O.R.*, 3rd year, Suppl. for April; or for aid in interpreting resolutions, e.g. use of an advisory commission to aid the Secretary-General in interpreting Resolution S/4741 of 21 February 1961. For further examples, see *Repertory of Practice of the Security Council* (1946-51), p. 299.

¹ Cf. Nuremberg principles, reaffirmed by the General Assembly in Resolution 95 (1); see also the *Draft Code on Offences against the Peace and Security of Mankind*, Article 1 of which states 'Offences against the peace and security of mankind, as defined in this code, are crimes under international law', *American Journal of International Law*, 49 (1955), Suppl. p. 19. In its Resolution 380 (V) the Assembly affirmed that any aggression, direct or indirect, 'is the gravest of all crimes against peace and security throughout the world'. It should be noted that the term 'crime' has come to have the specialized meaning of an illegal act of such magnitude that it incurs individual, as well as State, responsibility. It is used in this sense in the first two of the three examples cited above.

² Thus Fitzmaurice, in the 6th session of the Sixth Committee, thought 'it was not desirable to brand certain minor illegalities as acts of aggression', *G.A.O.R.*, 6th session, Sixth Committee, 292nd meeting.

³ See the statement of the Bolivian delegate to the Sixth Committee in 1952, that the control of the will of another State by depriving it of the economic resources which the structure of its

aggression (which, being a narrower term than 'breach of the peace' or 'threat to peace', implies a very high degree of coercion) *can* take place without any use of force, and that this must be considered, even where the methods are solely economic in nature, as too major to be a mere 'illegality'. Yet there would seem to be no infringement of Article 2 (4), even though the political independence or territorial integrity of the State may have been impaired. The Security Council may certainly deal with the situation under Article 39; the oft-stated corollary, that the target State has a right to self-defence in these circumstances, is, in the opinion of this writer, far more doubtful. The notion is a potentially dangerous one, and cuts undesirable inroads into the deliberate Charter emphasis on *armed* force and a hope of centralized control of the military instrument. Further, it stems from the erroneous assumption that 'self-defence' and the 'use of force' are mutual opposites, and identical in the scope of their rights and obligations.¹ This point will be discussed more fully below, under the claim of self-defence. So far as United Nations practice is concerned, the problem of whether extreme economic pressure is equivalent to a use of force has never clearly arisen, as charges of coercion which was primarily economic in character were dealt with in other, related, terms.²

economy required was aggression. Ibid., 284th meeting. The Lebanese delegate suggested, *ibid.*, 286th meeting, that the poisoning of a stream rising in a State's own territory, and flowing through a neighbouring country, or even altering its course, causing hunger and thirst, was aggression. This particular incident arose in relation to a complaint by Syria that Israel had begun work to change the flow of the Jordan through Israeli controlled territory. In its decision of 27 October 1953, S/3128, *S.C.O.R.*, 8th year, Suppl. for October–December, p. 37, the Security Council supported the recommendation of the Chief of Staff of *U.N.T.S.O.* that operations should cease pending an examination of the merits of the case. However, the decision was mainly based on the consideration that the Armistice Agreement did not permit any unilateral change in the status of the demilitarized zone, rather than whether the act was aggressive—though the plea of the Syrian delegate was couched in both terms. The Council was unable to reach any agreement on the merits of the case: *S.C.O.R.* 9th year, 656th meeting. The Netherlands delegate queried whether 'unilateral action to deprive a State of . . . economic resources . . . or to endanger its basic economy also justified the right of self defence by armed force?' *G.A.O.R.*, 6th session, Sixth Committee, 289th meeting at p. 221. The United Kingdom delegate, *ibid.*, 292nd meeting, at p. 240, thought 'it was difficult to imagine that the United Nations would have recourse to force in the case of economic aggression, since force should only be used to answer force'.

¹ On this point, very persuasively, see Roling, 'On Aggression, on International Law, on International Criminal Jurisdiction', *Nederlands Tijdschrift voor Internationaal Recht*, 2 (1955), at p. 173. He asserts that the duty to refrain from the threat or use of force covers more cases than the right to use force. And the 'function of the United Nations to assure peace and security in the world is the very reason why "aggression" and "self defence" are not complementary notions' (p. 178).

² Thus the frequently raised question of the Egyptian restrictions on goods and ships with Israeli connexions, in the Suez Canal, was dealt with primarily as a breach of the Armistice Agreements, which contained pledges 'against any further acts of hostility between the parties', and also of the Convention governing the status of the Canal, rather than as an act of aggression *stricto sensu*. None the less, the Egyptian practice was condemned, the resolution noting that such restrictions denied to innocent third nations 'supplies required for their economic reconstruction, and that these restrictions together with sanctions applied by Egypt to certain ships which have visited Israel ports represent unjustified interference with the rights of nations to

Similarly, there are strong grounds for arguing that the traditional term 'use of force' must also be taken to cover ideological and diplomatic methods when these are employed in a very high degree and aimed at impairing the territorial integrity or political independence of a State¹—though these latter words, as they appear in Article 2 (4), are governed by the phrase 'threat or use of force'.²

'Use of force' by Governments can also be passive, as well as active, can be indirect as well as direct: thus the arming of rebel groups in another State, or the refusal to forbid the training of rebels against another Government on one's own territory, or the failure to restrain volunteers from fighting in another State, are all forms of aggression commonly termed 'indirect aggression'—and from a functional point of view are a use of force.

For these reasons, it may be seen that it is far more helpful in every way to refer to permissible and impermissible coercion, rather than to legal and illegal uses of force. When a State asserts that there has been a use of force directed against it, it may mean that it has been subjected to military pressures by another State, or that it has been the object of other forms of coercion so extreme that they are tantamount to a use of force.

It will be noted that there are two main elements to the question 'What is force?' The first is the *method* of coercion—military, economic, diplomatic or ideological—and the second is the *degree* of coercion involved. No matter how minimally the military instrument is employed, there is a situation of force: how the degree employed affects the classification of

navigate the seas and to trade freely with one another'. U.N. Doc. S/2322, 1 September 1951, and *S.C.O.R.*, 6th year, 550th–558th meetings, 9th year, 658th–664th, 682nd–688th meetings.

On 11 July 1960 Cuba complained to the Security Council that the United States was pursuing a policy of economic aggression by the reduction of its sugar quota and the refusal to refine Cuban crude oil: and reserved the right of self-defence. By Security Council Resolution S/4395 of 19 July 1960 the question was deferred pending a report from the O.A.S.

Even more ambiguous than the practice are the *travaux préparatoires* of the Charter. At San Francisco a Brazilian amendment to Article 2 (4), adding the words 'and from the threat or use of economic measures', was rejected (*U.N.C.I.O.*, vol. 6, pp. 334, 559). However, the *Report of Committee I to Commission I* stated that 'the unilateral use of force or similar coercive measures is not authorized'; *ibid.* at p. 400 (italics mine). For support of contention that 'force' must be taken to include other than armed force, McDougal and Feliciano, *Yale Law Journal*, 68 (1959), at pp. 1059–61; and Kelsen in *The United Nations—Ten Years' Legal Progress* (1956), pp. 4–5.

¹ See General Assembly Resolution 381 (V), 'Condemnation of Propaganda against Peace', 17 November 1950, which stated that propaganda against peace includes 'incitement to conflicts or acts of aggression'; and Resolution 380 (V), 'Peace through Deeds', by which it is declared that 'whatever the weapon used, any aggression, whether committed openly, or by fomenting civil strife in the interests of a foreign power, or otherwise, is the gravest of all crimes against peace and security throughout the world'. In the Sixth Committee discussions on aggression the Indian delegate asserted that aggression did not necessarily imply resort to armed force, and that propaganda and aid to rebel organizations were measures undermining the Government of a State. *G.A.O.R.*, 6th session, Sixth Committee, 282nd meeting, at p. 177.

² Article 2 (4) states: 'All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of a state, or in any manner inconsistent with the purposes of the United Nations.'

the use of force as permissible or impermissible is another question, and will be explored below.

This article, then, purports only to examine practice relating to the use of force, or its equivalent: minor coercion, giving rise to issues of State responsibility and international torts, is beyond its scope.

(ii) *That the aggressor State has initiated the coercion*

In so far as the policy of the United Nations is to prevent the use of force in international relations, allowing it only in self-defence, the concept of the initiation of the use of force is implicit in the very notion of impermissible coercion; 'what community policy seeks to prohibit is resort to certain coercion, not responding coercion in necessary protection of values'.¹ However, it is also apparent that for one State merely to have committed an act of force prior in time to another State is not necessarily proof of its aggression. The issue depends both upon the point at which one deems the relevant time-period to have begun and all the other attendant circumstances.

Much of United Nations discussion on the topic has centred around the Soviet draft definition of aggression first put before the Sixth Committee of the General Assembly at its 6th session.² This definition deemed certain acts as 'aggressive', and that State which commits them first as the aggressor.³ The Soviet bloc laid emphasis on the fact that acts of themselves cannot be deemed aggressive, and only by the priority principle can they be distinguished from permissible self-defence in reply to a prior use of force.⁴ The draft resolution, which was presented for discussion in the

¹ McDougal and Feliciano, *Yale Law Journal* 68 (1959), at p. 1094.

² U.N. Doc. A/C.6/L.208. At the 5th session of the General Assembly the U.S.S.R. proposed that the Assembly define aggression (*G.A.O.R.*, 5th session Annexes, agenda item 72, U.N. Doc A/C.1/608/Rev. 1). The I.L.C. to which the matter was initially referred under General Assembly Resolution 599 (VI) failed to examine the Russian draft resolution. A discussion of the U.S.S.R. definition is to be found in the examination by the Sixth Committee of the Report of the I.L.C. (U.N. Doc. A/1858) covering the work of its 3rd session. *G.A.O.R.*, 6th session, Sixth Committee, 278-95th meetings, 5-23 January 1952.

³ The listed acts were the declaration of war against another State; invasion by its armed forces, even without a declaration of war, of the territory of another State; bombardment by its land, sea or air forces of the territory, or deliberately attacking the ships or aircraft, of another State; the landing or penetration of its land, sea or air forces within the boundaries of another State without the permission of its Government; or violation of the conditions of such permission; naval blockade of the coasts or ports of another State; support of armed bands organized in its own territory which invade the territory of another State, or refusal to deny aid and protection to such bands.

⁴ See, for example, the statement by the delegate of the Ukrainian S.S.R., *G.A.O.R.* 9th session, Sixth Committee, 408th meeting, p. 60. Certainly, if it is conceded that the priority principle is relevant, it is then necessary to decide what specific acts are relevant to the principle: '[The] priority principle was inherent in every definition dealing with armed attack and self defence. The only problem was as to what kinds of acts the priority principle related.' *Per Netherlands delegate, Report of 1956 Special Committee, G.A.O.R.*, 12th session, Suppl. No. 16, A/3574, at p. 19.

First Committee, the Sixth Committee and the Special Committee on the question of defining aggression, failed to be adopted. However, its failure was due to several reasons, not just the emphasis on the principle of the priority of coercion. There was a feeling by certain members that it was impossible to define aggression and perhaps undesirable to define it; further, there was a widespread rejection of the method of enumerative lists of aggressive acts.¹ It was clear, however, that a majority of States felt that the question of who first used coercion, used as an isolated criterion, was not helpful.²

The principle must be used not as a mechanical rule, but as one of the many factors to be weighed in seeking to ascertain an impermissible use of force.

The question of priority has to be related to all the circumstances, and especially to the policy of peaceful change upon which any law relating to coercion is based. What is, or is not, the 'first act' to be considered relevant can only be decided in this way. And:

'Determination of priority can lapse into an infinitely regressive historical excursion only when the decision-maker is unclear about the basic policy or in fact secretly rejects the minimum policy which demands that no change shall be effected through intense coercion and violence.'³

A clear eye kept on the basic policy at stake can enable the organs of the United Nations to decide what sequence in time is relevant to the question of initial coercion (and there is no avoiding the fact that this is a political decision). Emphasis on maintaining peace and security and on peaceful rather than violent change is apt to delimit the relevant period of time so that an interminable series of blows and counterblows will not be tolerated.

Certain aspects of the Palestine question have been very closely related to this point. Arguments justifying the incessant breaches of the Armistice Agreements⁴ by both parties are invariably based on the plea that the use

¹ Thus in the comments of Governments on the question of defining aggression, this point was raised by such diverse States as Egypt, France, Iraq and the Netherlands: U.N. Doc. A/2162. See also the comments of the Greek representative in the Sixth Committee (who was also a member of the I.L.C.), *G.A.O.R.*, 6th session, Sixth Committee, 292nd meeting, at p. 235; and of Saudi Arabia, *ibid.*, 290th meeting, at p. 225.

² See especially the comments of the United States representative, *ibid.*, 282nd meeting, at p. 173, who declared that if the priority principle as applied in the Russian definition were accepted, the U.S. would have been deemed an aggressor if it had received advance notice of Pearl Harbour and had destroyed the Japanese planes. The U.K. delegate thought that 'the question of which state was "first" to commit a certain act was basically irrelevant and that everything depended essentially upon the circumstances': *G.A.O.R.*, 9th session, Sixth Committee, 406th meeting, at p. 47. Another British jurist has written elsewhere, 'It is a poor foreign office which cannot, if it is necessary, create a situation in which it is the victim of the first blow'. Green, 'Armed Conflict, War, and Self-Defence', *Archiv des Völkerrechts*, 6 (1956-7), at p. 417.

³ *Ibid.*, at p. 1095.

⁴ Egyptian-Israeli General Armistice Agreement, U.N. Doc. S/1264/Rev. 1, *S.C.O.R.*, 4th year, Spec. Suppl. No. 3., pp. 1-14; Israeli-Lebanese General Armistice Agreement, S/1296/

of force was in reply to a prior use of force by the other party. While the question of the initiation of violence during any given period has to be taken into account, the decisions of the Security Council in condemning one side or the other have also been based on the degree of force used and the objectives at which it was aimed; and where such factors have been unclear, the Council has preferred to state a general condemnation of the use of force, directed at both parties, in accordance with the basic policy involved.¹

The statement of the Secretary-General on the status of the Armistice Agreements, and acts of force made in reply to breaches thereof, is very enlightening in this respect, and clearly reveals, in this complex area of 'priority of coercion', a primary adherence to the peaceful policy at stake.²

(iii) *That an illegal degree of force has been used*

The assertion, made by a State, that another State has used an illegal degree of force against it, normally arises in respect of the doctrine of self-defence, which decrees that measures taken in defence against a prior illegality must be proportionate to it in degree and kind.³ This aspect will be dealt with below, in the section on self-defence. However, the degree of force used is a relevant factor, in its own right, to be considered in any comprehensive analysis; for, if the Charter places the burden of proof on that State which resorts to force to prove that it is acting justifiably,⁴ then, *a fortiori*, any massive-scale measures raise a presumption of unlawfulness. Violence of a less intense nature may still prove a relevant factor when taken together with other circumstances.⁵

Rev. 1, *ibid.*, No. 4, pp. 1-7; Jordan-Israeli General Armistice, S/1302/Rev. 1, *ibid.*, No. 1, pp. 1-10; Israeli-Syrian General Armistice Agreement, S/1353/Rev. 1, *ibid.*, No. 2, pp. 1-11.

¹ See, for example, Security Council Resolutions S/2130, 8 May 1951; S/2512/Rev. 1, 18 May 1951; S/3538, 19 Jan. 1956; and *S.C.O.R.*, 10th year, 707th-715th meetings.

² S/3596, *S.C.O.R.*, 11th year, Suppl., April-June 1956: '... the interpretation of any one infringement of the provisions of the Agreement by one party justifies reactions by the other party which in their turn, are breaches of the armistice agreement ... would in fact mean that the armistice regime could be nullified by a simple infringement by one of the parties ...' (para. 16). '... the ceasefire is a stipulation in the agreement independent of the other articles [because there exists] an obligation on all members of the United Nations whose position in this respect can in no way have been changed by the armistice agreement' (para. 19). For discussion of the Secretary-General's Report, *S.C.O.R.*, 11th year, 723rd-728th meetings, specially the statement by the representative of Peru, 726th meeting. See also the Secretary-General's letters to President of the Council and the Foreign Minister of Syria: S/3596, Annex 3C, *S.C.O.R.* 11th year, Suppl. April-June 1956, pp. 56-60; and also an *aide-mémoire* to the States directly concerned, S/3584 (iv), *ibid.*

³ *The Caroline*. Moore, *Digest*, vol. 7, pp. 919 et seq.

⁴ This point is emphasized by Wright, 'The Definition of Aggression', *American Journal of International Law*, 50 (1956), at p. 528, where he asserts that there is no need for the community to prove *animus aggressionis*, the burden of proof lying with the State resorting to force.

⁵ Thus when minor incidents of violence are frequently repeated, as is often the case with border sorties, or they are accompanied by radio propaganda and threats, &c., the implication is that they are deliberate, and not isolated occurrences or genuine mistakes.

It has frequently been stated in the United Nations that very minor uses of force cannot constitute aggression;¹ but aggression, as we have shown, is a narrower concept than 'breach of the peace' and 'threat to the peace', and these latter may still be impermissible, even if they arise through minor uses of force. A State is not at liberty to repeat minor acts of violence against another State. Furthermore, United Nations practice has shown a tendency, when the facts are unequivocal, firmly to condemn minor displays of force, even if no major-scale aggression or nation-wide effects are involved. Thus a strongly worded resolution, under the title of 'Burmese Complaint of Aggression by the Republic of China', was passed by the Assembly in response to the fact that a few thousand ill-disciplined Chinese, for whom their Government denied responsibility, were roving within the Burmese borders, terrorizing the local population.²

Looked at from another point of view, the degree of force used is relevant in that it may help to assess the justifiability of a claim of self-defence. That is to say, quite apart from whether the particular use of force in question constitutes an aggression, or a breach of the peace, or a threat to the peace, it also affects the expectations of any reasonable and objective decision to be made by the target State as to whether it must act forcefully in self-defence to protect its sovereignty and independence, without time for recourse to the United Nations; and as to what type and degree of force it will apply in self-defence.³

(iv) *That the use of force is aimed at securing illegal objectives*

Whether or not the objective of the use of force is illegal is a question closely related to, but not identical with, that of *animus aggressionis*. The 'aggressive intention' of a State or Government is, unless related to the effects following from it, of interest to the United Nations only in so far as it may be a possible threat to the peace: it is not, of itself, an illegal use of force.⁴ The objectives of a State are the purposes for which it puts a

¹ See statement of the Iranian delegate that 'to constitute aggression the use of force must be sufficiently serious, otherwise the door would be open to dangerous abuses by States claiming to act in self-defence', *G.A.O.R.*, 9th session, Sixth Committee, 405th meeting, at p. 39. See also comments of the Netherlands and U.K. representatives, *G.A.O.R.*, 6th session, Sixth Committee, 289th meetings, at p. 220, and 292nd meeting, at p. 239 respectively.

² General Assembly Resolutions 707 (VIII) and 815 (IX).

³ This point is made by McDougal and Feliciano 'International Coercion, &c.', loc. cit., at pp. 1118-19: 'The key effect is the creation in the target state of reasonable expectations, as third party observers may term reasonableness, that it must forthwith respond with exercises of military force if it is to maintain its primary values, customarily described as "territorial integrity and political independence."'

⁴ The Burmese complaint of aggression by the Nationalist Chinese Government is of interest in this respect: the behaviour of the marauding Chinese armed bands on Burmese territory was deplored by the Chinese Government who stated that it had not sent a single soldier to reinforce these groups. It was generally felt that while the Chinese Government had no real control over these troops, it was its duty to influence them to leave Burmese territory. The adopted resolution

military operation into action.¹ The Charter has given some guidance as to what purposes or objects may be deemed lawful, for Article 2 (4) states:

'All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the Charter.'

Loss of territorial integrity implies the loss of effective control over an area, and possibly a loss of authoritative jurisdiction as well, if a specific area is formally ceded under the exigencies of hostile military operations. That is to say, if the armed forces of State A occupy and control an area of State B without making any legal claims to this area, the territorial integrity of State B is impaired. Thus the terrorizing presence of Nationalist Chinese bands along a strip within the Burmese border was found by the General Assembly to impair the territorial integrity of Burma;² though at no time did the Nationalist Chinese Government assert that the areas in question were rightfully its own. Similarly, even foreign aid and influence in aiding rebels of a State to gain insurgent control of parts of that State has been characterized as an infringement of territorial integrity.³ The principle applies to land, sea and airspace. How permanent the foreign occupation has to be is uncertain, but it would seem that even temporary incursions without permission into another State's airspace constitutes a violation of its territorial integrity.⁴

The question may also arise where State A not only has assumed control of part of territory which State B considers to belong to itself, but also asserts legal title to such area. The Jammu-Kashmir dispute affords an

refers to a violation of 'territorial integrity and political independence' (General Assembly Resolution 707 (VIII)), though it was agreed that the Government of Formosa had no intention of attacking Burma. See *G.A.O.R.*, 7th session, First Committee, specially 609th, 610th and 612th meetings.

The question of *animus aggressionis* was raised in the discussions on the definition of aggression: the rapporteur of the I.L.C. was of opinion that there existed no criterion to appreciate the subjective element of aggression. Professor Scelle, disagreeing, thought that all penal offences had an objective and a subjective element: and that the I.L.C. could define the objective element, while the subjective element depended solely upon the finding of the judge or judicial body: *Report of the I.L.C. covering the work of its 3rd Session*, U.N. Doc. A/1858.

¹ The relevance of this point has long been acknowledged. See, for example, the *Venezuelan Preferential* case (1904), vol. 6, pp. 559, 586. Moore *Digest*, where the German and American documents emphasized the temporary and limited character of the operation, denying an intent to make even the smallest acquisition of territory.

² General Assembly Resolutions 707 (VIII), 23 April 1953 and 815 (IX), 29 October 1954. For discussions, *G.A.O.R.*, 7th session, First Committee, 605th-612th meetings, and U.N. Doc. A/2375, 26 March 1953.

³ See resolutions on 'Threats to the Political Independence and Territorial Integrity of Greece', General Assembly Resolutions 193 (III), 27 November 1948, and 382 (V) B, 1 December 1950. Also U.N. Doc. A/644, *G.A.O.R.*, 3rd session, Suppl. No. 8A, p. 9, being the Reports of the Special Committee established by General Assembly Resolution 109 (II).

⁴ Thus Austria submitted a protest to the U.K. Government when its airspace was used as passage for British forces going to participate in the Suez operations. The objectives of the U.K., though not aimed at Austria itself, were clearly regarded as relevant by the Austrian Government in making its protest.

example, both Pakistan and India asserting that the entry of troops into Kashmir was an act of self-defence, Kashmir being national territory.¹ Moreover, a question of territorial integrity would seem to be involved when State A, under the pressure of military defeats by State B, agrees to cede a part of its territory;² though this situation comes very close to falling under the head of impairment of 'political independence'.

What, then, are actions directed against the political independence of a State? These are actions directed at controlling the Government and other institutional bodies of a State, either by setting up a particular form of government with defined ideological propensities or by forcing existing institutions to act in the interests of the foreign power.³ It is apparent that this end can be achieved by non-military as well as military means, by threats, subversion and pressures of all kinds. The General Assembly has unequivocally condemned the fettering of the political independence of a State, no matter by what method.⁴

The Czechoslovakian question of 1948 directly involved such questions. A communication was sent to the Secretary-General by Mr. Papanek alleging that the political independence of Czechoslovakia had been violated by the threat of force by the U.S.S.R., in violation of the provisions of Article 2 (4).⁵ The question was put on the agenda of the Security Council at the request of Chile. That both the methods employed—subversion and threats of force—and the objectives in sight—the overthrow of the Government of the Czechoslovakian Republic—were illegal was emphasized by

¹ The question, in its various stages, was before the Security Council from 1948 to 1951. See on this specially U.N. Doc. S/6208, containing India's statement: 382nd meeting, 25 Nov. 1948; 460th meeting, 10 February 1950; and 536th meeting, 9 March 1951; and U.N. Docs. S/1087 and S/2248, being the *Interim Report of the U.N. Commission* and the *Report of the U.N. Representative*.

² The cession of Sudetenland to Germany under the Munich Agreement, and its occupation between 1-10 October 1938, is a case in point: *Documents on British Foreign Policy, 1938-1939*, vol. 3, p. 83; and *Survey of International Affairs, 1938*, vol. 3, pp. 16 et seq.

³ Cf. Pompe, *Aggressive War—an International Crime* (1953), at p. 106: 'Political independence opposes the other classical aim of war: the imposition of one's will upon the attacked State.' McDougal and Feliciano, in *Yale Law Journal*, 68 (1959), at p. 1101, state: 'Impairment of "political independence" as an attack upon the institutional arrangements of authority and control in the target state . . . involves substantial curtailment of the freedom of decision-making through the effective and drastic reduction of the number of alternative policies open at tolerable costs to the officials of that state. It may further consist of an attempt to reconstruct the process of decision in the target state, to modify the composition or membership of the ruling elite group, and perhaps to dislodge that group completely and substitute another more acceptable to the attacking state.'

⁴ General Assembly Resolution 380 (V), 'Peace Through Deeds', which condemns 'the intervention of a State in the internal affairs of another State for the purpose of changing its legally established government by threat or use of force; 1. Solemnly reaffirms that, whatever the weapon used, any aggression, whether committed openly, or by fomenting civil strife in the interest of a foreign power, or otherwise, is the greatest of all crimes against peace and security in the world.'

⁵ U.N. Doc. S/696, *S.C.O.R.*, 3rd year, Suppl., January-March 1948; for discussions see *S.C.O.R.*, 3rd year, meetings 268, 272-73, 276, 278, 281, 288, 300, 303, 305. By a letter of 17 March 1948 (S/694, *S.C.O.R.*, 3rd year, Suppl., January-March 1948, pp. 31-34) Chile requested the Secretary-General to refer to the Security Council the communication from Mr. Papanek.

various delegates, including those of the United States, the United Kingdom and Belgium. But no decision of the Security Council incorporating these views ever was reached, for even the more moderate Chilean proposal that the Council appoint a subcommittee to receive evidence was defeated by a Soviet negative vote.¹

In United Nations practice, cases based on a claim that political independence has been violated have arisen most frequently from objections to troops being maintained on foreign territory contrary to the wishes of the territorial sovereign. Thus the Soviet complaint of the continuing presence of British troops in Greece in 1946;² the Iranian objections to the presence of Soviet troops in 1946,³ the Lebanese and Syrian demands for the withdrawal of British and French troops in the same year, all come under this head.⁴ So do certain aspects of the Tunisian complaints of French aggression in 1958.⁵ It is of interest that all the cases in which the factual situation complained of was the continued presence of troops of former colonial masters, or of foreign forces which were stationed in the territory during the Second World War, the resolutions passed were very moderate in tone. Only where foreign troops were present without these extenuating circumstances—such as in the Burmese-Chinese case—or where the objectives of the foreign troops were unmistakably illegal—such as in the Hungarian case—were strongly worded resolutions referring to ‘political independence and territorial integrity’ passed.

The issue arose in a tragic and unequivocal manner with the Russian intervention in Hungary in 1956. Premier Nagy objected to the role played by Soviet troops (who were originally in the country under the terms of the Warsaw Pact) in preventing the operation of the principle of self-determination; objected to the entry of additional Soviet troops; and then repudiated the Warsaw Pact.⁶ While the United Nations response in terms of effective action was severely curtailed (for reasons amply discussed elsewhere)⁷ its recognition of the legal issues involved, as reflected in its resolutions, was clear and unequivocal. All Security Council action being paralysed by the

¹ U.N. Doc. S/711, 6 April 1948.

² S.C.O.R., 1st series, 1st year, January–June 1946, pp. 73, 91, 172.

³ Ibid., and Suppl. No. 1, Annexes 2A, 2B; and No. 2, pp. 11–108; Suppl. No. 2, Annexes 2A, 2B, 2C, 2D.

⁴ S.C.O.R., 1st series, 1st year, Suppl. No. 1, Annex 9; and *ibid.*, January–June 1949, pp. 272 *et seq.*

⁵ S.C.O.R., 13th year, 811th, 819th–821st, 826th meetings. See also U.N. Docs. S/4861, S/4862, of 20 July 1960, concerning Bizerta.

⁶ See Premier Nagy's message of 1 November 1956 to the Secretary-General: U.N. Doc. A/3251.

⁷ E.g. Goodwin, in *International Affairs*, 34 (1958), p. 25; Hoffman ‘The United Nations, Egypt and Hungary’, *International Organization*, 11 (1957), vol. 3, p. 446; Béguin, ‘L’O.N.U. devant la réalité’, *Revue de droit international de sciences diplomatiques et politiques*, 34 (1956), 386; ‘Hungary and the U.N.’, *New Republic*, 17 December 1956, p. 6; Scott, ‘Hungary, Egypt and the Use of Force’, *The Listener*, 15 November 1956, p. 779.

Soviet veto, the Second Emergency Special Session of the General Assembly called upon the Government of the U.S.S.R. to

'desist forthwith from all armed attack on the people of Hungary and from any form of intervention, in particular armed intervention, in the internal affairs of Hungary . . . and affirms the right of the Hungarian people to a government responsive to its national aspirations and dedicated to its independence and well-being.'¹

Repeated references to the illegal objectives of the U.S.S.R. are to be found in the resolutions.² Resolution 1131, of the 11th regular session of the Assembly, specifically called upon the Government of the U.S.S.R. to withdraw its troops 'to permit the reestablishment of the political independence of Hungary';³ and an examination of the Report of the Special Committee on the problem of Hungary⁴ concluded that:

(a) the USSR in violation of the Charter of the United Nations, has deprived Hungary of its liberty and political independence and the Hungarian people of the exercise of their fundamental human rights.

(b) the present Hungarian regime has been imposed on the Hungarian people by the armed intervention of the USSR.⁵

More rarely has the question of illegal objectives arisen in the form of an armed invasion of territory. A discussion of the Korean conflict, while providing the most obvious examples, is beyond the scope of this article as it involves a use of force by the United Nations itself.

The heart of the Palestine question, especially the violence which occurred immediately after the declaration of the State of Israel, was concerned with a disputed claim to territory, with one party accusing the other of violation of its sovereignty and independence. Unlike the Jammu-Kashmir dispute, here the General Assembly had already placed on record its recommendations as to the land in question.⁶ However, as opinion in the United Nations on the status of Palestine was far from unanimous, the series of resolutions which were adopted were aimed at obtaining and implementing a cease-fire under Article 40—which did not prejudice the rights of the parties—rather than a finding of a violation under Article 2 (4)—which refers to both methods and objectives.⁷

¹ General Assembly Resolution 1004 (ES-II), 4 November 1956.

² General Assembly Resolutions 1005 (ES-II), 9 November 1956; 1006 (ES-II), 9 November 1956; 1127 (XI), 21 November 1956, which makes specific references to Article 2 (4) as well as Articles 55 and 56; and 1131 (XI), 12 December 1956; 1133 (XI), 14 December 1957.

³ General Assembly Resolution 1131 (XI), 12 December 1956.

⁴ A/3592, *G.A.O.R.*, 11th session, Suppl. No. 18.

⁵ As expressed in General Assembly Resolution 1133 (XI), 14 September 1957.

⁶ General Assembly Resolution 181 (XI), 29 November 1947. The resolution was adopted by 33 votes to 13 with 10 abstentions, and recommended partition with economic union.

⁷ See Security Council Resolutions S/773, 2 May 1948, *S.C.O.R.*, 3rd year, Suppl. for April; S/1070, 4 November 1948, *ibid.*, Suppl., for November; S/1080, 16 November 1948, *ibid.*; S/1376-II, 11 August 1949. At no time did discussion in terms of Article 2 (4) take place—the difficulties of such references were too apparent. At the early stages, however, the appropriateness of Article 39 was much debated, and, together with Article 40, it was used as the basis for

Similarly, the second phase of the Indonesian question involved the 'invasion' of a territory whose status was in dispute. The essential distinction between the Indonesian and Palestine cases and the Korean case was that in the former cases the status was so objectively and generally in doubt that it was felt preferable to deal with the situation in terms of a breach of the peace rather than aggression under Article 2 (4). In the Indonesian case the issue arose on the application of Article 39. The ultimate basis of the Security Council ruling was never made clear, though the Council was aided by the existence of the Linggadjati Agreement, by which the Netherlands had afforded *de facto* recognition to Indonesia.¹ None of the resolutions refer to Article 39, much less to Article 2 (4), or even to violations of territorial integrity or political independence. They merely call for a cessation of hostilities.² The nearest approach made by the Council to the question of objectives is to be found in the resolution of 1 November 1947, by which it:

'Advises the parties concerned, the Committee of Good Offices, and the Consular Commission that its resolution of August 1st should be interpreted as meaning that the use of armed forces by either party by hostile action to extend its control over territory not occupied by it on August 4, 1947, is inconsistent with the Council resolution of August 1st.'³

It must be emphasized that claims specifically citing Article 2 (4) are rarely made. The broader terms of Article 39 are invariably preferred. Certain general resolutions invoke the wording of Article 2 (4);⁴ and a very

the Council's jurisdiction. See especially discussions at 293rd-8th meetings, *S.C.O.R.*, 3rd year.

¹ Republic of the United States of Indonesia Information Office, *the Linggadjati Agreement between the Republic of Indonesia-Netherlands* (New York, 1947). The Australian application to the Security Council to put the question on its agenda termed the hostilities 'a breach of the peace' under Article 39: U.N. Doc. S/449, 30 July 1947, *S.C.O.R.*, 2nd year, Suppl. No. 16. Not only was it not clear under what article the representative of Indonesia was invited to participate but how far the adoption of the Australian resolution of 1 August 1947 (S/459) determined the Council's competence remained a matter of conjecture. The United States and France maintained that the question of competence was expressly reserved, whilst Poland thought it had been determined.

² Security Council Resolutions S/459, *S.C.O.R.*, 2nd year, No. 68; S/525, *ibid.*, Nos. 83 and 84. The former merely notes 'with concern the hostilities in progress between the armed forces of the Netherlands and the Republic of Indonesia'; and the latter refers to 'hostilities'.

³ Security Council Resolution, S/597, *ibid.*, No. 103. This interpretation of the earlier ceasefire resolution was necessary because the Consular Commission appointed by the Council reported on 11 October that the two sides were interpreting the ceasefire differently. The Indonesian Government 'ordered its troops to remain in their positions and to cease hostilities, [but] the N.E.I. Govt. considered it incumbent . . . to proceed with the restoration of law and order within the limits of the lines laid down by it'. U.N. Doc. S/581, 11 October 1947.

⁴ Thus the 'Essentials of Peace' resolution calls upon nations '2. to refrain from threatening or using force contrary to the Charter; 3. to refrain from any threats or acts, direct or indirect, aimed at impairing the freedom, independence or integrity of any state'. General Assembly Resolution 290 (IV). The 'Duties of States in the Event of the Outbreak of Hostilities' resolution reaffirmed that 'force of arms shall not be resorted to except in the common interest, and shall not be used against the territorial integrity or political independence of any state'. Res. 378/A (V). The 'Peace through Deeds' resolution condemns 'the intervention of a state in the internal affairs of

few resolutions on specific cases use such terminology.¹ In rare cases complaints by individual States have been framed almost in the terms of Article 2 (4).² However, in all the cases mentioned in this section, Article 2 (4), whether formally invoked or not, does seem relevant, and in all of them the objectives of the accused State were very much in issue.

(v) *That coercion has been imposed by illegal methods*

When discussing what is meant by the term 'a use of force', we concluded that both United Nations practice and a reputable body of opinion believe it to include not only armed violence, but also very high degrees of economic and ideological pressures, and varying combinations of all these elements. We also noted that the use of force may be indirect as well as direct.³

The suggestions of various delegates on the constituent elements of economic aggression have similarly been observed;⁴ there is virtually no case practice by the United Nations on this point. However, the very substantial developments which United Nations practice has made on 'indirect aggression' deserve further comment here. The problem of 'indirect aggression' was not considered at San Francisco, and the term does not appear in the Charter.⁵ The framers of the Charter were primarily concerned with the problem of 'armed attack', and it is only the unhappy events of the last

another state for the purpose of changing its legally established government by the threat or the use of force': Res. 380 (V). The exact wording of Article 2 (4) is contained in General Assembly Resolution 704 (VII), relating to the regulation, limitation and balanced reduction of all armed forces and armaments.

¹ Thus the Special Committee reported, and the General Assembly noted, that a continuation of foreign aid to Greek guerrilla rebels 'constitutes a threat to the political independence and territorial integrity of Greece'; General Assembly Resolutions 193 (III) and 288 (IV). See also the complaint by Burma against China, General Assembly Resolution 707 (VII); and 'Threats to the Political Independence and Territorial Integrity of China and to the Peace of the Far East . . .', General Assembly Resolution 385 B (V).

² See the complaint by Chile that, by the threat of force the U.S.S.R. had violated the political independence of Czechoslovakia; U.N. Doc. S/694, 12 March 1948, *S.C.O.R.*, 3rd year, Suppl. January-March 1948. This was also true of the Soviet complaint of the invasion of Taiwan by the U.S.A.; see Soviet draft resolution of 2 September 1950 (S/1757), and the draft resolution of the Central Peoples' Government of China of 30 November 1950 (S/1921).

³ Above, pp. 277-8.

⁴ Above, p. 276, n. 3.

⁵ We are here using the term 'indirect aggression' to cover non-overt military aid in the form of training, supplying arms, refusing to control 'volunteers', &c., and high intensity ideological propaganda. Certain writers choose to term economic coercion as an 'indirect aggression', presumably retaining to the term 'aggression' the meaning of 'armed attack'. Cf. Stone, *Aggression and World Order* (1958), at pp. 66-67. The terms direct and indirect seem to this writer to be more properly related to the degree of overtness of pressure, rather than the strategy used. Hence the omission of economic aggression from this discussion is solely due to a paucity of meaningful U.N. material. It may be noted that the Soviet Union likewise uses this distinction: in its usage 'indirect aggression' usually denotes 'subversion', sometimes aided by indirect forms of military aid, while 'economic aggression' is invariably referred to as 'direct aggression'. See Schultz, 'Der Sowjetische Begriff der Aggression', *Östeuropa*, 2 (1956), pp. 274, 284 (cited in Stone, *op. cit.*, p. 67, n. 147).

fifteen years which have strongly focused attention on the problem of 'indirect aggression'.

Indirect aggression has two main facets, both of which may be inextricably interwoven in any given case. The first consists of ideological propaganda of such intensity that its objective is the fomenting of civil war within a State in order to overthrow by force the legally established Government. The second is the giving of military aid and comfort—in the form of arms, training, resting facilities, 'volunteer' aid, &c., to the rebels of a State. Whether such aid given to an aggressor State in its attack on the victim State is indirect aggression or aggression *proprio suo* is not entirely clear. The present writer inclines to the latter view; the appeals which have been made in various resolutions involving armed conflict to third parties not to aid in any way those elements which have been condemned¹ give support to this interpretation. Even if no decision has yet been reached on the point by the United Nations it would seem that when State A aids State B by furnishing arms, &c., to it in its aggressive use of force against State C, State A is guilty of aggression rather than indirect aggression. The understanding of 'indirect aggression' is therefore the kind of situation when State A is fomenting civil war within State B and aiding the rebel nationals of State B either by propaganda or military help, or both.

General pronouncements on some of these activities have been made by various bodies of the United Nations. The Peace Through Deeds Resolution of the Assembly² clearly states

'... that, whatever the weapon used, any aggression, whether committed openly, or by fomenting civil strife in the interest of a Foreign Power, or otherwise, is the gravest of all crimes against peace and security throughout the world.'

Similarly, other resolutions have condemned propaganda against peace, and one has declared that 'such propaganda includes (1) incitement to conflicts or acts of aggression'.³ Again, certain activities comprising 'indirect aggression' have been defined as crimes against the peace and security of mankind by the International Law Commission.⁴

¹ See, for example, Security Council Resolution S/1501 of 25 June 1950, on the 'Korean Situation', paragraph III of which 'Calls upon all Members . . . to refrain from giving assistance to the North Korean authorities'. General Assembly Resolution 498 (V), 1 February 1951, found that 'the Central People's Government of the People's Republic of China, by giving *direct aid and assistance* to those who were already committing aggression in Korea and . . . has itself engaged in aggression in Korea' [italics mine: the italicized phrase makes this resolution less than authority for the proposition advanced, which refers to indirect aid]. See also paragraph 3 of General Assembly Resolution 997 (ES-I), on the 'Suez Intervention'.

² General Assembly Resolution 380 (V).

³ General Assembly Resolution 381 (V). See also Resolutions 110 (II) and 290 (IV), paragraph 8.

⁴ These include, in Article 2: '4. The organization, or the encouragement of the organization, by the authorities of a state, of armed bands within its territory or any other territory for incursions into the territory of another state, or the toleration of the organization of such bands in its own territory, or the toleration of the use by such armed bands of its territory as a base of operations or as a point of departure for incursions into the territory of another state, as well as direct

These 'law-making' activities did not, of course, occur *in vacuo*. They came about partly as a facet of the work on defining aggression; partly as an outcome of the Nuremberg principles, which gave rise to efforts to assess and formulate individual criminal responsibility; and partly because of various situations which were arising before the Security Council and the General Assembly.

The question of indirect aggression arose in clear form in the Greek frontier incidents question with which the Security Council was concerned from 1946 to 1951. By August 1946 incidents were occurring along the northern frontiers of Greece, and the Ukrainian delegate, condemning the Greek Government, requested Security Council action. A Russian draft resolution condemning the Greek Government for causing border incidents and persecuting minorities was defeated, and so was an American draft resolution calling for an investigation committee. In December 1946 the Greek Government requested the Security Council to consider the situation,¹ and a United States resolution—noting that all four Governments concerned had now made allegations—to establish a commission of investigation under Article 34 was unanimously adopted.² The Report of the Commission³ is very instructive. The charges by Greece that Albania, Bulgaria and Yugoslavia were supporting the guerrilla movement in Greece were upheld. Those actions by the Yugoslavian Government which were condemned included the training of refugees from Greece within the borders of Yugoslavia, and supplying them with arms and hospital facilities.⁴ In Albania there were camps for Greek refugees at which political and military instruction was provided. They were supplied with food and clothing and transported to the border.⁵ The aggressive acts of Bulgaria were even more 'indirect'—the Commission found that the evidence here indicated that Greek guerrillas, in groups and individually, were assisted in crossing Bulgarian territory from Yugoslavia to Greece, and that guerrilla groups had taken refuge on Bulgarian soil with the knowledge of the Bulgarian authorities.⁶ Both the Report and the subsequent resolution of the General Assembly⁷ found that this situation constituted a threat to the

participation in or support of such incursions. 5. The undertaking or encouragement by the authorities of a state of activities calculated to foment civil strife in another state, or the toleration by the authorities of a state of organized activities calculated to foment civil strife in another state. 6. The undertaking or encouragement by the authorities of a state of terrorist activities in another state, or the toleration by the authorities of a state of organized activities calculated to carry out terrorist acts in another state.' 'Report of the I.L.C.', *American Journal of International Law*, 49 (1954), Suppl. 21-22 (1955).

¹ U.N. Doc. S/203 and Add. 1, 3 December 1946, *S.C.O.R.*, 1st year, 2nd session, Suppl. No. 11.

² General Assembly Resolution 109 (II).

³ U.N. Doc. S/360/Rev. 1, *S.C.O.R.*, 2nd year, Spec. Suppl. No. 2, vol. 1.

⁴ *Ibid.*, Article III, chap. 1, pp. 106-7.

⁵ *Ibid.*, pp. 107-8.

⁶ *Ibid.*, p. 108.

⁷ General Assembly Resolution 193 (III), 27 November 1948. The resolution observed that the Greek guerrillas had continued to receive large-scale aid from Greece's northern neighbours,

political independence and territorial integrity of Greece, and was contrary to the Charter. This was re-asserted in a later resolution.¹ It should be noted that while this indirect aid was clearly condemned, the Assembly referred to acts in the terms of Article 2 (4), but did not categorize them as 'aggression'; nor did it use the term 'indirect aggression'. However, when those resolutions are read in the light of the Peace Through Deeds Resolution there can be little doubt that the actions of Yugoslavia, Albania and Bulgaria constituted 'indirect aggression'; or, more accurately, that these indirect forms of aid to rebels in another State constituted impermissible coercion.

The Czechoslovakian question also gave rise to charges of what was described as 'indirect aggression'. It was then not only asserted that the Government of Czechoslovakia had been overthrown by a threat of force from the U.S.S.R. (in the form of the massing of Soviet troops near the Czechoslovakian boundaries), but explicitly charged that indirect aggression—here in the form of subversion within the State—had taken place. The representative of the United States informed the Security Council:

'it was further alleged that Soviet officers participated in the acts of non-Communist political leaders; that Soviet agents worked in the Ministry of Interior which controls the police and the security troops and that Soviet agents were also among the armed militia in the streets of Prague.

'Allegations were made that Czechoslovakia was subject to indirect aggression and political infiltration which led to the subversion of the parliamentary regime . . .'²

Owing to the Soviet veto, the resolution was rejected by the Security Council: the *coup d'état* became a *fait accompli*. However, while the charges and the facts presented were denied by the U.S.S.R., the equation of political subversion with indirect aggression—and hence an impermissible form of coercion—was not disputed.

The issue arose again, though in a not very sharp fashion, in the Guatemalan question. On 19 June 1954 the Minister for External Relations of Guatemala, citing Articles 34, 35 and 39, requested the Security Council to take the measures necessary to prevent the disruption of peace and international security and also to put a stop to the aggression in progress against Guatemala. He stated that mercenary forces had invaded Guatemala from Honduras in spite of the requests of the Guatemalan Government to the

and [citing the Report] that they had 'been largely dependent on external supply. Great quantities of arms, ammunition and other military stores have come across the border . . . sharply held positions of the guerrillas have protected their vital supply lines from Bulgaria, Yugoslavia and, in particular, from Albania . . . [the guerrillas] frequently moved at will in territory across the frontier for tactical reasons . . . [and] retired safely into the territory of Albania, Bulgaria and Yugoslavia when the Greek army exerted great pressure.'

¹ General Assembly Resolution 382 (V), B.

² S.C.O.R., 3rd year, 281st meeting. See also U.N. Docs. S/694, S/711.

Honduras Government to restrain and control such elements; and that aircraft coming from the direction of Nicaragua had dropped bombs. The representative of Guatemala referred to these as 'acts of aggression'; he did not use the terminology 'indirect aggression', even though it was not suggested that the troops and aircraft were under the direct control of the Governments of Honduras and Nicaragua.¹ The Guatemalan appeal said that '*open aggression* has been perpetrated by the Governments of Honduras and Nicaragua at the instigation of certain foreign monopolists whose interests have been affected by the "progressive policy" of the Government of Guatemala'.² Much of the ensuing discussion was taken up with the question of whether this was an appropriate matter for the Organization of American States, or whether Guatemala had a right of direct access to the Security Council. The involvement of the United States was made apparent in the discussions, even though the representative of Guatemala stated that he had not sought to impute connivance either to the people or the Government of the United States.³ Such connivance as was to be deduced from the circumstances and the charges made took the form of tacit support and training facilities given to expeditionary forces whose objectives were the overthrow of the Guatemalan Government. The insistence that it was a case of overt, and not indirect aggression, may find its logic in the fact that the 'mercenaries', although not troops of the Governments of Nicaragua and Honduras, were not Guatemalan rebels—thus distinguishing this case from the Greek frontier incidents question. Although the question was never clearly pinpointed, a resolution was passed calling 'for the immediate termination of any action likely to cause bloodshed'⁴ and requesting members to refrain from rendering assistance to such action. It may therefore be assumed that if a government allows expeditionary forces intent upon invading another State to mount the invasion from its territory, it is responsible for an impermissible coercion, even if the forces are not under its direct control, and even if they are not rebels of the attacked State whom it is indirectly aiding.

The question of 'indirect aggression' was very much in evidence in all phases of the Lebanon question in 1958—the original complaint by Lebanon to the Security Council objected to United Arab Republic interference in its internal affairs by indirectly aggressive methods;⁵ and later, when the focus of attention switched to the legality of the landing of United States marines in Lebanon (and British troops in Jordan), the United States asserted that, as indirect aggression was taking place, the Government of

¹ S/3232, *S.C.O.R.*, 9th year, Suppl., April-June 1954, pp. 11-13.

² *Ibid.* (italics mine).

³ *S.C.O.R.*, 9th year, 675th meeting, paragraph 98.

⁴ U.N. Doc. S/3237, 20 June 1954, *S.C.O.R.*, 9th year, Suppl., April-June.

⁵ U.N. Doc. S/4007, 23 May 1958, *S.C.O.R.*, 13th year, Suppl., April-June.

Lebanon had every right to invite a foreign State to aid in its elimination.¹ This latter aspect will be examined in some detail below.²

The Lebanon complaint to the Security Council stated that the indirect aggression of the U.A.R. consisted of infiltration of armed bands from Syria into Lebanon, the participation of U.A.R. nationals in acts of terrorism and rebellion in Lebanon, and the waging of a press and radio campaign in the U.A.R., calling for strikes, demonstrations and the overthrowing of the Lebanon authorities. It was charged that there was a large-scale supply of arms from the U.A.R. to subversive elements in Lebanon, that these elements were being trained in U.A.R. territory, that U.A.R. nationals were taking an active part, and all with the approval and knowledge of the Government.

Asserting that arms can always be obtained during periods of unrest, and that responsibility could not be imputed to the U.A.R. for their availability, the U.A.R. delegate went on to deny that the use of radio and press could affect peace and security—yet at the same time insisting that those methods were being used to defend his country against Lebanese attacks by the same method.³ Whether in the particular case those methods were affecting the peace and security of the region is one matter; but it cannot be denied—either factually, or as the considered opinion of the Assembly⁴—that those methods *can* cause these effects. Furthermore, the resolution ultimately passed by the 3rd emergency special session of the Assembly demanded that non-interference be maintained ‘by word and deed’.⁵

A United Nations Observation Group in Lebanon was sent to investigate the charges.⁶ The various reports of U.N.O.G.I.L. failed to confirm that the situation of civil strife in Lebanon was caused by U.A.R. indirect aggression.⁷ When American troops were sent to Lebanon and British troops to Jordan (after the overthrow of King Feisal of Iraq), the matter came before the General Assembly, in its 3rd special session, and was ultimately resolved by the ability of the Arab States to find a joint formula.⁸ Lebanon insisted throughout that the U.N.O.G.I.L. reports were incorrect in assuming that as there was no ‘massive infiltration’ the U.A.R. was not behaving aggressively,⁹ for infiltration was only one part of massive

¹ *S.C.O.R.*, 13th year, 827th meeting.

² Below, pp. 308–11.

³ *S.C.O.R.*, 13th year, 823rd meeting, at p. 29.

⁴ General Assembly Resolution 381 (V), ‘Condemnation of Propaganda Against Peace’.

⁵ General Assembly Resolution 1237 (ES-III), paragraph 2.

⁶ Under the terms of the Security Council Resolution S/4023, 11 June 1958, *S.C.O.R.*, 13th year, Suppl., April–June.

⁷ See U.N. Docs. S/4040 and Con. 1 (*1st Interim Report of U.N.O.G.I.L.*); S/4051 (*Interim Report of U.N.O.G.I.L.*); S/4052 (*2nd Interim Report of U.N.O.G.I.L.*), *ibid.*, Suppl. for July–September. Both the U.A.R. and the Soviet bloc insisted that the disorders in Lebanon were due to the fact that President Chamoun wished to continue in office for a second term contrary to the Constitution, which he proposed to alter to suit his plans.

⁸ General Assembly Resolution 1237 (ES-III), 21 August 1958.

⁹ See the statement of Galo Plaza in U.N. press release LEB/15, 17 July 1958.

intervention in internal affairs, which was being brought about by various methods.¹

Indirect methods of aggression were again in issue in the Laotian question of 1959. The Laos Government asserted that the Royal army was being subjected to attacks by the rebel Pathet Lao movement, with elements from the Democratic Republic of Viet-Nam participating, and that aid was also being given in the form of artillery fire from the other side of the frontier.² The intervention was termed a 'flagrant aggression', and it was to investigate this charge that a subcommittee was ordered to conduct inquiries.³ It has been pointed out, with accuracy, that the terms of reference of the subcommittee did not authorize it to ascertain whether the Pathet Lao activities had been directed and supported from Hanoi—thus constituting (it is argued) indirect aggression—but rather to see whether there existed 'flagrant aggression, for which the Democratic Republic of Vietnam must bear the entire responsibility'.⁴ Consequently, little can be derived from the fact that the subcommittee failed to find evidence that Laos had been invaded, though it did find that 'various degrees and kinds of support have been accorded to hostile elements from sources on the north Vietnamese side of the border'.⁵

The detailed methods of coercion which were complained of were the training of troops in North Vietnam, the arming of such troops and the policy of open frontiers for such personnel. Further, it was charged that Hanoi radio was inciting Laotians to revolt. The conclusions of the subcommittee indicate certain indirect North Vietnamese military help,⁶ but do not go into the question whether they constitute impermissible coercion, as to have done so would have been beyond its terms of reference.⁷

The methods of coercion may also prove relevant when it is claimed that the particular instrument or weapon used is illegal *per se* under any circumstances. Thus, the use of an illegal weapon—even in self-defence against

¹ S.C.O.R., 13th year, 828th meeting.

² U.N. Doc. S/4212, 4 September 1959, S.C.O.R., 14th year, Suppl., July–September.

³ Under Security Council Resolution S/4214 of 7 September 1959, 847th meeting.

⁴ Rossi, 'Civil War or Aggression', *Foreign Policy Bulletin*, vol. 39, no. 4 (1 November 1959). See also Wilcox, 'Great Power Cooperation in the United Nations', *Department of State Bulletin*, 9 November 1959.

⁵ *The Economist*, 14 November 1959, p. 642.

⁶ U.N. Doc. S/4236, 5 November 1959, S.C.O.R., 14th year, Suppl., October–December, especially pp. 30–31, which states that the actions, while differing in scope and magnitude were all of a guerrilla character; and nearly all witnesses stated that the hostile elements received support of arms and supplies from North Vietnam, and permission to rest and re-form within North Vietnamese territory. However, no troops of the Regular Vietnam army appeared to be involved.

⁷ It should be added that wide doubts were expressed as to the ability of the subcommittee to present any significant objective report, as the Laotian information services were inefficient, racial and linguistic affinities existed between peoples both sides of the border, and communications were very erratic because of the geography of the country. Further, the only information offered was by the Government of Laos.

armed attack (though possibly not if the prior armed attack itself involved the use of the particular weapon involved)—is of itself an impermissible form of coercion. The only occasion when such an assertion has arisen in the United Nations occurred during the Korean conflict, when the U.S.S.R. charged the use of bacteriological warfare by the United Nations forces. The Unified Command immediately denied the charges, and a United States resolution in the Security Council to authorize an investigation by the Red Cross failed of adoption because of the negative Soviet vote.¹

(vi) *That community procedures for peaceful change or redress
of grievances have been refused*

It has long been recognized that willingness to accept available procedures for the cessation of hostilities is an important factor in the assessment of the lawfulness of coercion. The idea found expression in the League Covenant in the concept of 'provisional orders', by which any party refusing to obey a cease-fire order of the Council would be branded an aggressor.² Similar devices were to be found in a number of conventions drafted under League auspices;³ and the procedure was followed in the Greco-Bulgarian frontier dispute of 1926, among others.⁴

The idea reappears, though in less automatic terms, in the United Nations' Charter. Article 40 provides that the Security Council, when dealing with threats to the peace, breach of the peace or acts of aggression, may 'call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable'. Moreover, account shall be taken 'of failure to comply with such provisional measures'. Again, the Assembly Resolution on the Duties of States in the Event of the Outbreak of Hostilities recommends that States involved in conflict should publicly proclaim their readiness, provided other parties will do the same, to discontinue military operations and withdraw invading forces, and that their conduct in relation

¹ *S.C.O.R.*, 1st year, 584th–590th meeting, and *S.C.O.R.*, 7th year, Suppl., April–June 1952, p. 17. More generally, see General Assembly Resolution 502 (VI), which stated the Assembly's desire to eliminate and prohibit 'atomic, hydrogen, bacterial, chemical and all such other weapons of war and mass destruction . . . '.

² Article II, Covenant of the League of Nations.

³ None of which, however, were ratified. These conventions included Article 10 of the Geneva Protocol of 1924 (*League of Nations Journal* (1924), Special Suppl. No. 24, pp. 138–9); and Article 5, General Convention for Improving the Means of Preventing War, 1931 (*ibid.* (1931), Special Suppl. No. 93, p. 242).

⁴ For examination of the effectiveness of this idea in various cases before the League, see Wright, 'The Concept of Aggression', *American Journal of International Law*, 29 (1935), at pp. 377, 389; and *id.*, *International Law and the United Nations* (1960), pp. 87–88. The usefulness of this test has been frequently stressed by Professor Wright; see also 'The Legality of Intervention under the United Nations Charter', *Proceedings of American Society of International Law*, 51 (1957), at p. 87.

to this recommendation shall be taken into account in determining responsibility for breaches of the peace or acts of aggression.¹

In the Korean case, after the initial call by the Security Council for a cessation of hostilities, subsequent indictments of North Korea were based partly on its refusal to comply with provisional measures.² The General Assembly decision to name the Peoples' Republic of China an aggressor made specific reference to the same factor.³

In the Palestine question constant reference has been made to the compliance or non-compliance of a particular party with 'community procedures'—usually cease-fire orders.⁴

The relationship between 'reasonable conduct' and adherence to 'community procedures' has been very much in evidence in the actions taken by various Governments. Thus the United Kingdom Government was at pains to emphasize that it would withdraw from Suez as soon as the United Nations could provide the necessary guarantees there;⁵ both the United Kingdom and the United States Governments stressed that as soon as the United Nations could stabilize the situation in the Middle East, it would withdraw its forces from Jordan and Lebanon;⁶ and, more recently, the United Kingdom assured the United Nations that it would remove its troops from Kuwait as soon as the Security Council or Arab League could obtain a guarantee from Iraq that it would not use force to maintain its territorial claims to Kuwait.⁷

As with all the other evidence which is relevant to an assessment of whether coercion is legal or illegal, this does not give automatic results. The element of interpretation by the authoritative body must remain. If a State lacks all confidence in the efficacy of the United Nations to halt an aggression of which it is the victim, it may well deem it essential to keep

¹ General Assembly Resolution 378 (V), 17 November 1950.

² Thus in its initial Resolution of 25 June 1950 (S/1501), the Security Council called for 'the immediate cessation of hostilities' and called 'upon the authorities of North Korea to withdraw forthwith their armed forces to the 38th parallel'. The Resolution of 27 June 1950 (S/1511), now noted that 'the authorities in North Korea have neither ceased hostilities nor withdrawn their armed forces to the 38th parallel'.

³ General Assembly Resolution 498 (V), in which it stated 'that the Central People's Government of the People's Republic of China has not accepted United Nations proposals to bring about a cessation of hostilities in Korea with a view to peaceful settlement . . . '.

⁴ See especially Security Council Resolution S/2152/Rev. 1 of 18 May 1951; and Security Council Resolution S/902 of 15 July 1948, *S.C.O.R.*, 3rd year, Suppl., July, which expressly took into account that 'the Provisional Government of Israel has indicated its acceptance in principle of a prolongation of the truce in Palestine; that the states members of the Arab League have rejected successive appeals of the U.N. Mediator and of the Security Council . . . for the prolongation of the truce in Palestine'.

⁵ See, for example, *S.C.O.R.*, 11th year, 748th meeting, at p. 30; and *G.A.O.R.*, 1st emergency special session, plenary meetings, 561st meeting, the comments of Sir Pierson Dixon at pp. 6, 8.

⁶ See, for example, the statements of the delegates of those countries at the 835th meeting of the Security Council, *S.C.O.R.*, 13th year.

⁷ See draft resolution presented by U.K., 6 July 1961, U.N. Doc. S/4855, 6th preambular paragraph.

on fighting in the face of a resolution calling for a cease-fire directed at both parties. However, refusal altogether to allow the Organization to offer its services,¹ and even a refusal to comply with provisional measures, does at least raise a *prima facie* presumption of illegality against the State concerned.

B. WHERE ONE PARTY IS CLAIMING A LEGAL USE OF FORCE AGAINST ANOTHER, THE FOLLOWING ASSERTIONS MAY BE HEARD

(i) *That force is being used in self-defence*

The plea of self-defence is perhaps the most frequently heard justification for a particular use of force. Obviously, it is closely related to the charge of initiation of coercion, for a State acting in self-defence is by definition not the initiator of the illegal use of force. But even given the fact of initiation of coercion, there remains much to be said about self-defence, and United Nations practice has been extremely abundant in the provision of materials.

Article 51 of the Charter provides:

'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.'

The unanimity of the Big Powers which was hoped for, in the area of peace and security, broke down in the immediate post-war era, and one effect of this breakdown was that Security Council findings under Article 39 have been comparatively rare, and the provisions of Article 51 of ever-increasing importance. Action may be begun in self-defence without the prior authorization of the Security Council, and no one permanent member of the Security Council can negative the initiation of such action. Moreover,

¹ See, for example, the refusal of the U.S.S.R. to allow a commission of investigation to examine the merits of the disputes occurring on the Greek border in 1946. *S.C.O.R.*, 1st year, 70th meeting, p. 412. Sometimes such a refusal is conveniently couched in the terms of Article 2 (7), by which the State concerned declares the matter within its own domestic jurisdiction. For example, the refusal of the Kadar Government of Hungary to allow the Secretary-General to examine the situation in that country: U.N. Doc. A/3315, *G.A.O.R.*, 2nd emergency special session, Annexes, agenda item 5; and *ibid.*, plenary meetings, 571st meeting, paragraphs 153, 192; and, more recently, the refusal of the Portuguese Government to allow entry into Angola of the commission of inquiry set up by General Assembly Resolution 1603 (XV). The refusal of Sir Roy Welensky to accede to the request of the Secretary-General, that U.N. observers be placed along the Rhodesian-Katangan border to prevent the illegal entry of arms into the latter, may also be considered relevant. See *The Times*, 3 January 1962, p. 6, cols. 1, 2.

once action in self-defence is in motion, an affirmative decision of the Council, including the concurring votes of the permanent members, is required to order its cessation.¹ In other words, action in self-defence is not subject to the veto. In consequence the assertion of self-defence is frequently made by individual States; and many groups of States arranging for collective security have preferred to designate their provisions as collective self-defence, rather than regional arrangements.² The danger that, in the event of the failure of the Security Council to reach the necessary affirmative decision to stop an alleged action in 'self-defence', a cloak may be provided for aggression has in part been met by the Uniting for Peace Resolution, which permits subsequent review of the particular use of force by the General Assembly—a two-thirds majority vote being there sufficient for a determination of threats to the peace, breaches of the peace, or acts of aggression.

Under traditional international law it has long been accepted that self-defence is justified only when the necessity for action is 'instant, overwhelming, and leaving no choice of means, and no moment for deliberation'.³ Moreover, the acts done in self-defence 'must not be unreasonable or excessive, since the acts justified by a necessity of self-defence must be limited to that necessity and kept within it'.⁴ It is generally agreed that self-defence is a specific form of self-help.⁵ Professor Waldock, basing his view upon an examination of the *Corfu Channel* case,⁶ has suggested that self-defence is an affirmation of rights illegally and forcibly denied.⁷ It is important to emphasize the narrow nature of self-defence, as forceful self-help in reply to a *forceful* denial of rights.⁸ How far the terms of Article 51 limit the traditionally understood notion of self-defence will be examined below.⁹

¹ The importance of this point is spelled out in detail by Waldock, 'The Regulation of the Use of Force by Individual States in International Law', *Receuil des cours*, 2 (1952), at p. 496.

² See above, pp. 270-1, n. 4.

³ *The Caroline*, Moore, *Digest*, vol. 7, pp. 919 et seq.

⁴ Waldock, loc. cit., at p. 463.

⁵ Though whether the genus has survived is of some doubt. The point will be discussed below, p. 313.

⁶ *I.C.J. Reports*, 1949, p. 5 (Merits).

⁷ Waldock, loc. cit., at p. 502. The Court found that the passage of British warships, in action stations, through the Strait, subsequent to the explosion of mines, was not a violation of Albania's sovereignty. To point to this finding, as does Professor Waldock, as an upholding of the forcible affirmation of legal rights, is to state the case too broadly. What the Court's finding *does* show is that a threat, or demonstration of force, may be considered self-defensive, when it is in affirmation of rights which have been illegally *and* forcibly denied.

⁸ This view is shared by Kelsen, 'Collective Security and Collective Self-Defence under the Charter of the United Nations', *American Journal of International Law*, 42 (1948), at p. 748, who states that self-defence is self-help against a specific violation of the law, against the illegal use of force.

⁹ It is clear that self-defence belongs to the sphere of preventive justice. It does not include a right to exact reparation for injury actually done. Thus in *The Caroline*, op. cit., the Law Officers advised the British Government that Canada's action could only be justifiable as a precaution against future injury, not as a retaliation for past injury. [Cited by Waldock, loc. cit., at p. 464.]

As Article 51 was framed as an exception to the prohibition of force in Article 2 (4), there immediately arises the question of whether self-defence is only permitted in response to an armed attack. Is forceful self-defence a legitimate response to non-violent indirect aggression? And is it allowed to anticipate a threatened use of force?

Under general international law, within the terms of *The Caroline*, there has always been recognized an 'anticipatory' right of self-defence.¹ Article 51, however, uses the phrase 'if an armed attack occurs'. It should be noted that the French text is considerably less restrictive, reading 'dans un cas où un Membre des Nations Unies est l'objet d'une agression armée'. Yet there appears to be some diversity between the statements of scholars and of representatives of Governments in specific cases before the United Nations.²

In the Tunisian question of 1958, the Tunisian Government complained to the Security Council of French aggression in the form of bombings and violence at Sakiet-Sidi-Youssef.³ It now forbade all movement of French troops upon its territory, stating that should those provisions be violated, 'the Tunisian government would then consider itself in a state of self-defence'.⁴ The dispute was ultimately settled by negotiation, but not before the French delegate had unequivocally stated that Article 51 requires an armed attack; in fact, he stated his objection even more broadly, denying that the right of self-defence was available to anything less than *armed aggression*, which the single incident of Sakiet-Sidi-Youssef could not be.⁵

The *Corfu Channel* case upholds this well-tried principle, which will be examined in more detail below: though the League of Nations action in the Corfu Incident of 1923, by which the Council allowed Italy to exact the price of 50 m. lire for its withdrawal from Corfu, is a curious anomaly.

¹ See Bowett, 'Collective Self-Defence Under the Charter of the United Nations', this *Year Book*, 32 (1955-6), at p. 148. This right has been recognized, in the case of an imminent threat, by the Nuremberg Judgment, which stated 'preventive action in a foreign country is justified only in case of an instant and overwhelming necessity of self-defence, leaving no choice of means, and no moment of deliberation' (British ed., London, 1946, at p. 28). The General Assembly unanimously approved the Nuremberg Judgment in Resolution 95 (I). Similarly, the Tokyo verdict regarded as justified the action of the Netherlands, whereby 'faced by the imminent threat of invasion of her Far Eastern territories which the conspirators had long planned and were now about to execute, the Netherlands in self-defence declared war on Japan' (*Transcript of Proceedings*, p. 49. 768).

² The vast majority of scholars insist upon an anticipatory right of self-defence notwithstanding the terms of Article 51. Thus, see Waldock, loc. cit., at p. 498, who states that where there is convincing evidence not merely of threats but of an attack actually being mounted, then an armed attack may be said to have begun to occur even though it has not passed the frontier, and a right of self-defence under Article 51 becomes available. Also Röling, 'On Aggression, on International Criminal Law, on International Criminal Jurisdiction', *Nederlands Tijdschrift voor Internationaal Recht*, 2 (1955), at p. 174; Svarlien, *Introduction to the Law of Nations*, at pp. 339 et seq.; Spiropoulos, *G.A.O.R.*, 6th session, Sixth Committee, 279th meeting; Fitzmaurice, *ibid.*, 281st meeting. Cf. Kelsen, *Law of the United Nations* (1950), pp. 791-800; and Beckett, *North Atlantic Treaty* (1950), at p. 13.

³ *S.C.O.R.*, 13th year, U.N. Doc. S/3951, 13 February 1958.

⁴ *Ibid.*, U.N. Doc. S/4013, 29 May 1958.

⁵ *Ibid.*, 819th meeting.

The same position was taken by the Indian delegate in arguing his country's case in the Jammu-Kashmir dispute.¹ The question arose again, but in a very unclear way, with the Jordanian invitation under Article 51 to British troops to come to its aid when faced with 'imminent foreign aggression'.² Here the debate turned on the right of Jordan to issue such an invitation, and of Britain to accept it, which made the issue less distinct than if Jordan had actually instigated military action in response to an allegedly imminent attack.³

Although the debates on the restrictions on certain shipping (Israeli-owned, or bound to or from Israel) through the Suez Canal by Egypt turned largely on other points (which will be examined below), Israel contended that one of the several reasons that Egypt's claim of self-defence was ill-founded was because no armed attack had occurred;⁴ the United Kingdom, indicating its doctrinal position on the controversy under discussion, added: 'It cannot even be maintained that Egypt is under any imminent threat of attack from Israel.'⁵

The question came up more sharply in the Suez intervention of 1956. While the United Kingdom and France did not base their actions upon self-defence, *stricto sensu*,⁶ but rather upon protection of international rights of passage, national vital interests and lives and property of nationals,⁷ Israel did, quite specifically, base her advance into Egyptian territory upon a right of self-defence. Israel stated that she had entered Egyptian territory to wipe out the fedayeen bases, from which there had been continual—and recent—attacks. These fedayeen raids were occurring with the consent and approval of the Egyptian Government, which had clearly stated on many occasions that its policy was 'to push Israel into the sea'.⁸ Israel stated that there was evidence of a massive attack upon her which was soon to occur,⁹ and laid emphasis upon Egyptian pronouncements that the two countries were in a state of war.¹⁰ In response to the suggestion that isolated fedayeen

¹ *S.C.O.R.*, 5th year, 460th meeting; and again at the 536th meeting: 'The right of self-defence begins only when there is an armed attack against a Member.' The contrary position of Pakistan has consistently been maintained in various bodies of the United Nations. See, for example, *G.A.O.R.*, 9th session, First Committee, 809th meeting.

² *S.C.O.R.*, 13th year, 813th meeting.

³ The question of 'invitation' as a justification for the use of force will be discussed below.

⁴ *S.C.O.R.*, 6th year, 551st meeting.

⁵ *Ibid.*, 550th meeting.

⁶ Such arguments being left to the more ingenious British jurists. See, for example, Green: 'Armed Conflict, War, and Self-defence', *Archiv des Völkerrechts*, 6 (1956-7), who states at p. 434: 'The fact that such action has not been so described [i.e. as inherent self-defence] does not invalidate it, nor alter its character as such.'

⁷ To be discussed below, pp. 315-18.

⁸ *S.C.O.R.*, 11th year, 749th meeting, pp. 8-10.

⁹ Certain documents supporting this contention were captured during the Egyptian retreat.

¹⁰ Which pronouncements had been especially vehemently reiterated during Security Council debates on restrictions on passage of ships through the Suez Canal by Egypt. Egypt had claimed rights of visit, search and seizure, and the Israeli delegate commented that 'the flags of fifteen nations, endowed with the unconditional right of free navigation in the Suez Canal, have been

raids did not warrant an invasion of territory in self-defence, Israel contended that a long series of encroachments constituted in its totality the essence and the reality of an armed attack.

Thus the question was raised: if a State has been subjected, over a period of time, to border raids by nationals of another State, which are openly supported by the Government of that State; to threats of a future, and possibly imminent, large-scale attack, and to harassing restrictions to her trade under alleged belligerent rights, may it use force in self-defence, in anticipation of the continuation of such action? The present writer is of the opinion that this question, thus phrased, must be answered affirmatively—but always with the proviso that the action in self-defence is proportionate, in nature and degree, to the prior illegality of the imminent attack. And it seems to be on this latter point that Israel's case fell down before the United Nations, for the great majority of States felt that the invasion of Egyptian territory was disproportionate to the previous attacks suffered, and to the imminent threats. The issue therefore turned on the question of proportionality, which we shall discuss below. Because of an almost unanimous preference on the part of Member States for general stability in the Middle East, rather than the unequivocal testing of the principle of anticipatory self-defence, Israel's position was condemned;¹ and whether, in anticipatory self-defence, Israel would have been justified in entering Egyptian territory solely to liquidate individual fedayeen bases, assuming no other control of territory, remains a hypothetical question. While not specifically designating Israel an aggressor, the earlier resolutions noted that her actions were contrary to the Armistice Agreements, and called for their withdrawal;² and the later resolutions deplored her non-compliance with these requests.³

The disparity between reflective comment and spontaneous reaction in a given situation may also be seen in the First Report of the Atomic Energy Commission to the Security Council in 1946,⁴ which suggested the possibility that something short of armed attack might justify resort to abused and prejudiced by unlawful acts of interception (*G.A.O.R.*, 1st emergency special session, 562nd meeting). The Israeli delegate also raised a point which is akin to the doctrine of estoppel (but not identical, as it referred to breach of Security Council conditions as well as to its own past acts and statements by the Government of Egypt) stating 'in juridical and legal terms Egypt has cut itself off' (*ibid.*).

¹ It should be noted that not only was Israel's position condemned on the issue of proportionality, but also because of implications of collusion with Great Britain and France; moreover, at times the plea of self-defence became indistinguishable from retaliation, a practice persistently condemned by the Security Council. Furthermore, there was no doubt among the members that Israel's action was in breach of the Armistice Agreements (on the Secretary-General's view that self-defence under the Agreements was to be narrowly interpreted, in order to give them maximum efficacy, see S/3596, *S.C.O.R.*, 11th year, Suppl., April-June 1956). The rejected United States Resolution of 30 October 1956, U.N. Doc. S/3710, condemns Israel on these terms.

² General Assembly Resolutions 997 (ES-I); 999 (ES-I).

³ General Assembly Resolutions 1002 (ES-I); 1120 (XI); 1123 (XI); and 1124 (XI).

⁴ U.N. Doc. A.E.C./18/Res.1, p. 24.

measures of self-defence under Article 51.¹ Yet in virtually all those instances where a right of anticipatory self-defence has been specifically in issue—such as with Israel in the Suez intervention—the United Nations has preferred not to give rein to the doctrine. This does not, however, warrant the assumption that Article 51 has restricted the right as laid down in *The Caroline*; there has merely been a reluctance on the part of the United Nations to encourage it, for fear that it may be too fraught with danger for the basic policy of peace and stability.

A similar question, arising from the use of the words 'armed attack',² is whether other forms of coercion—either indirect military methods, or illegal non-military methods—may give rise to a right of self-defence.

It has been strongly argued by the representative of the Netherlands—and it is a view with which the present writer concurs—that the concepts of aggression and self-defence are not complementary.³ The inherent right of self-defence exists only to the extent to which protection by a higher authority is not justified. Hence there may be aggressive acts which give rise to a recourse to the Security Council, but not to a defensive use of force. Where there has been a prior use of force, 'instant and overwhelming . . . leaving no choice of means and no moment of deliberation', there arises, within the reviewing measures provided for by Article 51, the inherent right of self-defence. This would seem to apply equally to an indirect use of force as well as to a direct use of force. Thus the Lebanon delegate, in reserving to his country the right of self-defence against alleged indirect violence by the United Arab Republic in 1958, stated that:

'Article 51 does not speak of a direct armed attack. It speaks of armed attack. It wishes to cover all cases of attack, direct or indirect, so long as it is an armed attack . . . is there any difference from the point of view of the effects between direct armed attack or indirect armed attack if both of them are armed and if both of them are designed to menace the independence of a country?'⁴

¹ And see the view of the United States with respect to proposals for control of atomic warfare, in *U.S. Memorandum*, No. 3, 12 July 1946: ' . . . an "armed attack" is now something entirely different from what it was prior to the discovery of atomic weapons. It would therefore seem to be both important and appropriate under present conditions that the treaty define "armed attack" in a manner appropriate to atomic weapons and include in the definition not simply the actual dropping of an atomic bomb, but also certain steps in themselves preliminary to such action.' Cited by Jessup, *A Modern Law of Nations* (1948), at p. 167.

² For a detailed examination of the meaning of the term 'armed attack', see above, pp. 299–300.

³ *G.A.O.R.*, 9th session, Sixth Committee, 419th meeting, paragraph 12; *G.A.O.R.*, 6th session, Sixth Committee, 289th meeting; and Röling 'On Aggression, &c.', loc. cit.; and *Report of the Special Committee on the Question of Defining Aggression*, *G.A.O.R.*, 9th session, Suppl. 11, A/2638.

⁴ *S.C.O.R.*, 13th year, 833rd meeting. At the 836th meeting the Lebanon delegate stated that his Government was not prepared to abandon the application of Article 51 until the United Nations had taken action to stop the infiltration of armed men and the sending of arms through the Lebanese frontiers. The claim of self-defence against indirect military aggression was also raised by France during the Tunisian-French mutual charges of aggression in 1958. Declaring that Sakiët-Sidi-Youssef, which it had bombed, was a rebel garrison for the F.L.N., training

However, as the right of self-defence carries the obligations of overwhelming necessity and proportionality, it would seem that non-violent aggressions of the economic or ideological sort give rise to a right to recourse before the Security Council under Article 39, but not a right to forceful action under Article 51.¹

That Article 51 has in no way impaired the traditional requirement of proportionality and reasonableness in the exercise of the right of self-defence is clearly shown by United Nations practice.² The Israeli penetration into Egyptian territory was condemned on those grounds, as well as for breach of the Armistice Agreement, even by those sympathetic to her position.³ At times the requirement of proportionality is difficult to grasp, and the Israeli delegate argued—without success—that Israel's action was only equivalent to a long history of attacks and harassments.⁴ However, once one retreats into history, self-defence begins to partake of the flavour of retaliation; so that in assessing proportionality, only the immediate illegality against which forceful self-defence is taken is relevant.

It should be noted that under Article 51 the inherent right of self-defence is available until the Security Council has taken the measures necessary to maintain international peace and security. Such measures do not necessarily reflect or pass upon the legality of the actions of the State purporting to act in self-defence. That there are situations so immediate and pressing that a State must be allowed to act in defence has never been denied.⁵

recruits and providing arms, the French Government insisted that its actions were defensive. *S.C.O.R.*, 13th year, 819th meeting.

¹ Both the widespread belief that aggression and self-defence are completely complementary, and that indirect aggression only applies to the non-military methods of aggression (and not indirect military methods) have led to much confusion here. Thus the United States delegate to the Special Committee on the Question of Defining Aggression, whilst in effect stating the same conclusion as the present writer, thought that while retaliatory measures were available to economic aggression, force was not; and that therefore there was a danger in extending the definition of aggression to include economic aggression. Cf. the position of the U.S.S.R. delegate (*ibid.*, p. 6), who offered a definition which included economic and ideological aggression, stating that it was clear that the concept of aggression in Article 39 was much wider than that of armed attack in Article 51; yet this did not mean that the grounds on which States could use force in self-defence would be extended, since Article 51 made it clear that armed attack was the sole justification in such cases.

² We find completely without justification the statement by Professor Kunz, 'Individual and Collective Self-defence in Article 51 of the Charter', *American Journal of International Law*, 41 (1947), at p. 878, that 'necessity or proportionality are no conditions for the exercise of self-defence under Article 51' as 'armed attack means . . . any illegal armed attack'.

³ Thus the Australian delegate, *S.C.O.R.*, 11th year, 748th meeting, p. 7, commented that Israel's suffering at the hands of Egypt did not warrant retaliation of this kind; and China, *ibid.*, p. 22, stated: 'The action taken by Israel is disproportionate to the wrongs that Israel says it has suffered.'

⁴ *G.A.O.R.*, 1st emergency special session, 562nd meeting. For further confirmation of the principle of proportionality, see the resolution of the Security Council on the attack by Israel on Syrian territory in 1956 (the Tiberias incident), which stated: 'According to the reports of the Chief of Staff there has been interference by the Syrian authorities with Israel activities on Lake Tiberias . . . that interference in no way justifies the Israel action' (U.N. Doc. S/3538).

⁵ Thus France, in accepting the Pact of Paris of 1928 issued a reservation that 'each country

This is totally in keeping with the basic nature of self-defence, which is that of an exceptional right which may only be exercised if no other means are available. Temporarily, then, a State must be judge in its own cause. However, in order that the right shall not be abused, it is essential that it be subjected to international review. This reasoning, which had been acknowledged under general international law,¹ becomes even more compelling where there exists an international organization with a body entrusted with the primary responsibility for the maintenance of peace and security.

A constant awareness of this has been shown in United Nations practice, though on occasion difficulties have arisen over the question whether in fact the Security Council can be said to have taken the measures necessary to maintain international peace and security. Thus during the Suez intervention the United Kingdom repeatedly stated that it was prepared to withdraw its forces from Egyptian territory as soon as the United Nations was able to guarantee the flow of passage through the Suez Canal.² It did not regard the resolutions calling for a cessation of hostilities as a guarantee of such, though ultimately it came to accept the role played by the United Nations Emergency Force. However, the repeated condemnation of the United Kingdom by the vast majority of States³ would seem to indicate that it is not for the State allegedly taking action in self-defence to decide whether the Security Council⁴ has taken the measures necessary to secure peace and security, but that it is for the United Nations itself to decide.

In the course of its complaint to the Security Council of United Arab Republic intervention, the Lebanon stated that its request for aid from the United States was under its right to self-defence; and that it was not prepared to abandon this right until the action taken by the United Nations was adequate to achieve the cessation of infiltration from the U.A.R., and the territorial integrity and political independence of the Lebanon.⁵ On the other hand, the U.S.S.R. contended that no right of self-defence remained,

should retain the right of legitimate defence'; which led to the statement by Kellogg that: 'That right is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require resort to war in self-defence.' U.S. Note of 23 June 1928, cited in Jessup, *A Modern Law of Nations* (1948), at p. 163.

¹ As the Nuremberg Tribunal stated with reference to the invasion of Denmark and Norway: 'Whether action taken under the claim of self-defence was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced' (*Trial of German Major War Criminals* (London, 1946), *The Judgment* (Cmd. 6964), at p. 30).

² *S.C.O.R.*, 11th year, 749th meeting at p. 3; 751st meeting at p. 7.

³ e.g. General Assembly Resolutions 997 (ES-I); 999 (ES-I); 1002 (ES-I); 1120 (ES-I).

⁴ The situation is somewhat complicated by the Uniting for Peace Resolution, which removes the question to the General Assembly. However, it would seem that, from a functional point of view, if the Security Council transfers the problem to the General Assembly, which then passes resolutions, the Security Council has, in fact, 'taken the necessary measures to maintain international peace and security' in at least the sense that the State pleading self-defence is now to be held accountable for its actions.

⁵ *S.C.O.R.*, 13th years, 836th meeting.

as the Security Council had already acted by taking a decision which allowed for the settlement of the situation inside the country, and by the establishment of U.N.O.G.I.L.¹ This view was reiterated by the U.A.R.²

The same point has arisen in relation to the charges by Israel against Egypt of restrictions on the passage of ships through the Suez Canal. One of Egypt's contentions was that she was acting in necessary self-defence.³ The United Kingdom observed that under the Charter the right could only be exercised until the Security Council had acted, and this it had done by assuming responsibility for the maintenance of international peace and security in the area by underwriting the Armistice Agreements, and by continually calling upon the parties to implement them.⁴ The Security Council resolution of 1 September 1951⁵ referred to the existence of the Agreements (though not to the role of the Council in their implementation), and found that the restrictions on passage by Egypt 'cannot in the prevailing circumstances be justified on the ground that it is necessary for self-defence'. In 1954 the question was raised again, and the Egyptian delegate stated:

'... the individual or collective right of self-defence may not be overridden in favor of the Security Council except insofar as the States concerned are so well protected by the resources available to the Security Council that the abandonment of their right of self-defence will not harm them.'⁶

However, even though for various political reasons prevalent at the time a New Zealand draft resolution calling upon Egypt to comply with the earlier resolution failed to be adopted, when the matter was raised yet again later in the year, the President of the Security Council stated that it was evident that most representatives regarded the resolution of 1 September 1951 as having continuing validity and effect.⁷ It is obviously in accordance with the guiding policies discussed earlier in this chapter that self-defence, where the integrity of armistice agreements is involved, must be strictly interpreted in relation to Security Council action in order to give the armistice maximum efficacy.⁸

¹ *S.C.O.R.*, 829th meeting.

² *Ibid.*, 6th year, 550th meeting.

³ *Ibid.* See also statement of Israel delegate, *ibid.*, 551st meeting.

⁴ Security Council Doc. S/2322 (same as S/2298/Ad. 1; adopted 1 April 1951 at 558th meeting).

⁵ *S.C.O.R.*, 9th year, 658th meeting.

⁶ *Ibid.*, 682nd meeting. See especially the statement by the representative of Peru, insisting that the right of self-defence was a preliminary and provisional situation, pending final action by the U.N. to complete and ratify it; and that where a conflict had already given rise to U.N. intervention and where hostilities had been terminated as a result of an armistice concluded under U.N. auspices, the Council must be said to have acted (*ibid.*).

⁸ Thus see the *Report of the Secretary-General* pursuant to the resolution of 4 April 1956 on the status of the Armistice Agreements (S/3596, *S.C.O.R.*, 11th year, Suppl., April-June 1956): 'A party which has given an unconditional assurance to observe the cease-fire clause, with reserve only as to self-defence under the Charter, is covered by its reserve for self-defence in cases of non-compliance by the other party with its obligations under the Charter, or under the Armistice

Article 51 also requires that measures taken in the exercise of the right of self-defence shall be immediately reported to the Security Council. It may easily be appreciated that failure to comply with this stipulation is at least an indication that the measures are in fact not defensive.¹

To what does the right of self-defence extend? Only to the national territory? Or to overseas possessions as well? Or to forces or nationals on the high seas? The United Kingdom has long maintained a right to self-defence of overseas possessions²—though with the loss of most of the former colonies that issue has never pertinently arisen in United Nations practice. None the less, opportunities for disagreement with this stand have not been missed.³ A similar position to that of the United Kingdom has been taken by France on Algeria.⁴

The Russian draft resolution on aggression⁵ included as aggressive acts—and presumably, in the context, acts giving rise to a right of self-defence by the victim—‘deliberately attacking the ships or aircraft of another state’. It was not specified that such ships or aircraft were within the territorial boundaries. United Nations practice has thrown little light on this point, and further clarification must be awaited.⁶

Agreement, only if and when such non-compliance is found to be a reason for the execution of the right of self-defence as recognized in Article 51 of the Charter. *The Security Council alone can decide whether this is the case or not. The reserve for self-defence in the several ceasefire assurances and the significance it may give to compliance with the Charter, other clauses in the Armistice Agreement or relevant Security Council decisions, is thus under the sole jurisdiction of the Security Council, in accordance with the rules established*’ (paragraph 40; italics mine).

¹ On at least two occasions it has been suggested that failure to report to the Security Council at the time of taking action precludes such action from being classified as self-defence. See the statement of the French delegate on the Tunisian situation. *S.G.O.R.*, 13th year, 810th meeting; and that of the Indian delegate during the debates on the Kashmir question, *ibid.*, 6th year, 536th meeting.

² Thus the British Government accepted the Briand-Kellogg Pact with a reservation of self-defence that was geographically extended beyond the territorial limits of Great Britain. ‘There are certain regions of the world the welfare and integrity of which constitute a special and vital interest for our peace and safety. His Majesty’s Government have been at pains to make it clear in the past that interference with those regions cannot be suffered. Their protection against attack is to the British Empire a measure of self-defence.’ Note of 18 July 1928 (cited in Green, *loc. cit.*, at p. 411). For the observation that this was regarded by the British Government as comparable to the Monroe Doctrine, *ibid.*

³ See the comments of the delegate of Egypt (at which the British reservation was specifically directed) in the Sixth Committee. *G.A.O.R.*, 6th session, Sixth Committee, 291st meeting, A/C.6/SR.291.

⁴ Though the legal principles involved are not exactly identical as France has always maintained that Algeria is not merely an overseas possession, but rather an integral part of France, and a metropolitan department: *G.A.O.R.*, 11th session, First Committee, 830th meeting, pp. 99–100; and *ibid.*, 12th session, First Committee, 913th meeting, p. 253. The claim to self-defence in this case is therefore presumably based on the right to defend the national territory of a State.

⁵ U.N. Doc. A/C.6/L.208.

⁶ It is noted by Waldock, *loc. cit.*, at pp. 465–6, that the Secretariat memorandum for the I.L.C. on the régime of the high seas is far from helpful on this point. In one passage it recognizes that the basis for exercising jurisdiction in a contiguous zone of the high seas is self-protection. Yet in another passage the application on the high seas of the principle of self defence in cases like *The Virginius* is represented as a portrayal of ‘the objectionable doctrine of necessity’ (A/CN.4/32 (1950), p. 802). In *The Virginius* (1873), Moore, *Digest*, vol. 2, pp. 895–903, a

Article 51 refers to both individual and collective self-defence. The concept of collective self-defence is a new one, and, in the opinion of this writer, an inaccurate one.¹ Defence of the self cannot be collective; though there may exist collective security or mutual aid. It has been cogently argued that the right of collective self-defence in Article 51 exists only where the interests of an attacked State are so intrinsically bound up with the territorial integrity and political independence of another State that the defence by the latter State of the former is truly 'self'-defence.² The geographical proximity of the States comprising many 'collective self-defence' pacts may in fact make them fall within the terms of Article 51.³ Other defence arrangements are not necessarily illegal, but are collective security—and as such the legality depends on considerations different from those governing the legality of action in collective self-defence.⁴ To interpret the phrase 'collective self-defence' otherwise is to confuse the concepts of defence, collective security and community sanctions.⁵

The reference to 'collective self-defence' in Article 51 was introduced to safeguard the inter-American system of mutual defence, as exemplified by the Declaration of Lima of 1938, the Act of Havana of 1940 and the Act of Chapultepec of 1945.⁶ The question arises whether the term only covers action by members of regional arrangements; and the answer would seem

United States hostile vessel, carrying British subjects, was intercepted by a Spanish ship. The United States protested on the grounds that Spain had no jurisdiction over United States vessels on the high seas. The United Kingdom, on the other hand, admitted the right of self-defence at sea in face of an imminent threat, protesting only against the summary execution of British subjects. It has been suggested that in relatively minor cases of an illegal use of force at sea, a pecuniary penalty is more appropriate than a right of self-defence. Jessup, *A Modern Law of Nations* (1948), at p. 120, who observes that in the *I'm Alone* case (Dept. of State Arbitration Ser. No. 2 (7) (1935), p. 4), the Commissioners concluded that the United States should apologize to the Canadian Government and pay them a sum of \$25,000.

¹ For a concurring view, see Kunz, 'Individual and Collective Self-defence in Article 51 of the Charter', *American Journal of International Law*, 41 (1947), at p. 875; cf. Kelsen, 'Collective Security and Collective Self-defence under the Charter of the United Nations', *ibid.*, 42 (1948), p. 783.

² Bowett, 'Collective Self-defence under the Charter of the United Nations', this *Year Book*, 32 (1955-6), p. 130.

³ Bowett suggests that the relevant criteria are the geographical proximity of the States involved, their political proximity and their strategic or economic proximity.

⁴ Relevant to this point is the controversy as to whether the legal character of the Uniting for Peace Resolution is that of 'collective measures' for the purpose of maintaining international peace and security under Article 1 (1) (as is contended by Bowett); or of collective self-defence (as is concluded by Stone, *Legal Controls of International Conflict* (1959), at pp. 272-81). Both the role which the Security Council has assumed before the resolution can be brought into play, and the very wording of the resolution itself, lead this writer to the former view. The implications of the distinction of action taken in 'collective self-defence' and under 'collective measures' is fully examined by Bowett, *Self-defence in International Law*, pp. 241-2.

⁵ Which finds expression in the statement of Lauterpacht on collective self-defence that 'such extension of the notion of self-defence is a proper expression "of the ultimate identity of interest of the international community in the preservation of peace".' Oppenheim, *International Law*, (7th ed.), vol. 2, at p. 155.

⁶ For a history of the drafting and discussion in this context, see Russell and Muther, *A History of the United Nations Charter* (1957), pp. 694-8.

to be in the negative. In the Hungarian uprising the Soviet Union based its action, in part at least, upon the Warsaw Pact; but this was a regional arrangement based on Article 51 and, furthermore, provided collective self-defence against external aggression, not against revolution from inside.¹ The issue arose in a less ambiguous form when the Lebanon invited United States troops to come to its aid against alleged indirect aggression.² The United States was under no treaty obligation to the Lebanon. It was argued against the position taken by the Lebanon that in fact the Government was inviting a foreign State to aid it in suppressing a domestic rebellion, and that no 'armed attack' had occurred against the Lebanon.³ Thus, the opposition to the United States action was based on grounds other than that no treaty governing 'collective self-defence' existed between the United States and Lebanon; and finally the matter was settled by agreement between the Arab States and the establishment of a United Nations 'presence' in Beirut.⁴

There are wider implications to both this and the Hungarian case, which may pertinently be examined here under the next and closely related assertion of the legality of a use of force.

(ii) *That force is being used under an invitation*

The contention of the U.S.S.R. that its intervention in Hungary in 1956 was lawful was based partly on the purely political grounds of the impossibility of permitting a territory adjacent to the U.S.S.R. to become 'a breeding ground for fascism'; and partly on a twofold legal argument, the first aim of which relied on the Warsaw Pact, and the second on an 'invitation' from the Hungarian Government.⁵ Similarly, in the Lebanon situation of 1958, the Government of Lebanon announced that it was requesting aid from the United States to meet external indirect aggression; and a similar request was made by the Jordanian Government to the United Kingdom.⁶ The question was therefore posed in both cases, may one government ask another government for military assistance when it considers itself in danger, and may the government appealed to respond?

¹ See on this point the statement of the United Kingdom representative, *S.C.O.R.*, 11th year, 746th meeting, and of the Peru delegate, *ibid.*

² Statement of the Lebanon delegate, *S.C.O.R.*, 13th year, 827th meeting.

³ See the U.S.S.R. draft resolution, U.N. Doc. S/4047, and the statement of the U.A.R. delegate, *S.C.O.R.*, 13th year, 828th meeting.

⁴ General Assembly Resolution 1237 (ES-II).

⁵ See, for example, statement of the U.S.S.R. delegate, *G.A.O.R.*, 2nd emergency special session, 546th meeting.

⁶ See statement of United Kingdom delegate, *S.C.O.R.*, 13th year, 831st meeting: 'There is nothing either in the Charter or in the established rules in international law to inhibit a government from asking a friendly government for military assistance as a defensive measure when it considers itself to be in danger. Nor is there anything to inhibit the government thus appealed to from responding.'

The issue was blurred in both cases, as in the Hungarian case the vast majority of members considered the Kadar Government a 'puppet' Government, incapable of making a free invitation representing the wishes of the Hungarian people; and in the Lebanon and Jordan cases it was argued by many that the situation was one not of external aggression, but of internal revolt¹—so that the question became: may a Government invite military assistance from another Government in suppressing an internal revolt? The answer to this last question depends upon the status of the rebels—if they have 'established themselves securely in a determinate portion of territory and have acquired an apparently stable government of their own',² a duty of non-intervention arises in their favour. This principle is in keeping with the principle of self-determination, which has, over the last fifteen years, led to the widespread view that there may now be a legal right of revolution,³ that is to say, that under the principle of self-determination, the peoples of a territory must be allowed—if necessary by forceful means—to replace their government by one of their own choice. This principle finds express approval in the resolutions passed in the Hungarian intervention.⁴

However, it seems that if there is evidence of support of the insurgents

¹ Statement of U.A.R. delegate, *S.C.O.R.*, 13th year, 823rd meeting; and that of the U.S.S.R. delegate, 827th meeting. It should be noted that the U.N.O.G.I.L. reports did not, by and large, confirm the complaints against the U.A.R.—and the *1st Interim Report of U.N.O.G.I.L.* was already available by the time the United States sent its troops to the Lebanon: U.N. Docs. S/4040 and Conv. 1, S/4051, S/4052, *S.C.O.R.*, 13th year, Suppl., July–September. For details of the original Lebanon complaint against the U.A.R., see U.N. Doc. S/4007, *ibid.*, Suppl., April–June. See also Wright, 'United States Intervention in the Lebanon', *American Journal of International Law*, 53 (1959), p. 112, who suggests that in this case the situation was so uncertain as to cast the onus of proof of legality upon the United States. He further suggests that action, even under a collective defence treaty, requires an explicit request, the alternative being too open to abuse. See also Potter, 'Legal Aspects of the Beirut Landing', *ibid.*, 52 (1958), p. 727.

² Eli Lauterpacht, *The Times*, 24 August 1960, p. 9, col. 6; and 'Intervention by Invitation', *International and Comparative Law Quarterly*, 7 (1958), pp. 99–100, where it is pointed out that the test which the invited State is called upon to apply is analogous to that employed to determine whether belligerency of insurgents should be recognized: conflict must have a general, rather than a local character; insurgents must be in occupation and control of substantial portions of the territory; and they must conduct hostilities in accordance with the rules of warfare. Recent events in Africa—namely the secession of Senegal from the Mali Federation and the attempted secession of Katanga from the Congo—raise the question of whether these criteria are adequate to aid a state in deciding to recognize insurgents which are not aiming to set up an alternative government, but rather to secede from the State: and *ex hypothesi* they will not control major portions of the territory, and the conflict may well be of a local character.

³ Wright 'Recognition and Self-determination', *Proceedings of American Society of International Law* (1954), p. 29; and 'United States Intervention in Lebanon', *loc. cit.* See also Cosentini, quoted in preparatory study on *Draft Declaration on Rights and Duties of States* (1948), U.N. Doc. A/CN.4/2, p. 65: 'Intervention cannot be legalized by the existence of a treaty authorizing it in the case of civil war, or by the formal consent of the government against which a revolution has been started.'

⁴ In General Assembly Resolution 1004 (ES-II) the Assembly 'affirms the right of the Hungarian people to a government responsive to its national aspirations and dedicated to its independence and well-being'. Resolution 1005 (ES-II) urges elections 'to enable the people of Hungary to determine for themselves the form of government they wish to establish in their country'. See also Resolution 1133 (II).

from foreign States, the Government may call for help from a foreign power itself, even if the fighting on its territory has reached the dimensions of a civil war.¹

Recently the Security Council was seized of a situation occurring through the acceptance by the United Kingdom of a request for aid from Kuwait, over whose territory Iraq had been asserting claims. While the United Kingdom was unable to secure passage through the Council of a resolution supporting its right to send troops to Kuwait (S/4855, 7 July 1961), it did, none the less, avoid condemnation (S/4856, 7 July 1961). The situation here is rather curious, as the external threat was not backed up by a civil war or, indeed, by any insurgency at all. So the legal question at issue was whether a State which considers itself threatened by another may call for help from a third power—to which the answer must surely be in the affirmative provided always that this right is not abused, and made use of to threaten a neighbouring State (which is presumably what Iraq meant in its assertions of ‘gunboat diplomacy’). This, therefore, seems to be an example of an act which is legal but may prove, in the circumstances, and at the discretion of the Security Council, to be impermissible as a ‘threat to the peace’ under Article 39 of the Charter. In this particular case the issues were singularly blurred, as the basis of Iraq’s claim was that no *bona fide* invitation could be made or received, as Kuwait was a part of Iraq, and not a sovereign State at all. As we have seen, where fighting is widespread, the Council has shown a tendency to cut through a claim of this sort in order to stop the fighting, irrespective of the merits of the case. Where it is dealing only with a threat of force, however, it seems less anxious to meet such problems, and in this case failed to take any action at all.

The question of whether the type of invitation or request for aid is relevant has been somewhat clarified by United Nations practice, which has tended towards a negative answer. In Kuwait the United Kingdom was requested for aid under the terms of a mutual aid pact of 19 June 1961, and has not claimed to be acting under Article 51; and the threat was solely

¹ See comment of Eli Lauterpacht, ‘Intervention by Invitation’, *loc. cit.*, that ‘the fact that a foreign State is a participant, albeit indirectly, characterizes the reaction of the lawful government as a measure of legitimate self defence against aggressive conduct affecting the political independence and territorial integrity of the State. In these circumstances, other States are entitled to render assistance to the lawful government in the exercise of their inherent right of individual or collective self-defence’. Those who hold Dr. Bowett’s view of collective self-defence (above) will wish the principle to be stated more narrowly, namely that if a foreign State is involved in the insurrection, the Government may receive help from another State provided that State is also truly put in a position of self-defence by the interference of foreign elements in the rebellion. Events in Katanga, where the foreign influence has always been emphasized by the United Nations, indicate that even if a State may not obtain aid from another State, it may obtain it from the United Nations if the rebellion is supported by a foreign power, though the help of the United Nations is obviously not based on Article 51.

external. In the Lebanon the United States claimed to be replying to a request for aid based on no treaty, and that it had the right to agree under Article 51; and in this case there was an internal rebellion, possibly fomented from without. In Hungary the U.S.S.R. based its right of intervention not only upon a specific treaty (the Warsaw Pact, which in reality did not give a right of intervention in the case of internal rebellion, but only in the case of an external threat), but also upon a specific invitation from the Government: and here the insurrection was internal. At no time was it suggested that different legal consequences flowed from these various methods of request for aid. The questions that a State must ask itself before agreeing to help of this sort remain the same whether its action falls within the terms of a treaty or not, whether it purports to be taken as an action in collective self-defence or not.

(iii) *That force is being used under belligerent rights*

Where a State asserts that its use of force is legally justifiable, as it is acting under rights of belligerency, it is necessary both to ensure that the specific methods of force being used are in fact those generally recognized as stemming from a condition of belligerency, and that belligerent rights do in fact exist.

There is no material in United Nations practice on the former point, though the latter question of the existence of belligerent rights was very much in issue during the debates on the restrictions upon passage of certain ships and goods through the Suez Canal.

When called upon by Israel to justify her restriction of certain ships through the Suez Canal, and the confiscation of certain cargoes, the Egyptian delegate maintained that his Government still regarded itself as in a state of war with Israel, and that it reserved to itself, for its own protection, certain belligerent rights of visit, search and seizure. He argued that a peace treaty and not an armistice was required to bring to an end a state of war, and that no such treaty had been signed.¹

Traditional international law is less than clear as to whether a general armistice is compatible with the exercise of the right of visit and search, and there is a marked division of opinion among jurists.² The Security Council's refusal to accept the arguments of the Egyptian Government were based in part upon the fact that actual major hostilities between Israel and Egypt had not been in progress for some two and a half years, and that

¹ S.C.O.R., 6th year, 550th meeting.

² Oppenheim, *International Law* (7th ed.), vol. 2, p. 547, states that a partial, and even general armistice is not incompatible with the exercise of the right of visit and search, such acts not being acts of war. And see *Ahmed Emin Bey v. Great Britain* (1927, U.K.-Turkish Tribunal), 7 F.A.M., 922. Cf. Stone, *Legal Controls of International Conflict* (1959), at pp. 643-4, and *Ruffy-Arnell v. The King* (1922), 1 K.B. 599, at 612-13.

to claim belligerent rights in such a situation was in fact an *abus de droit*.¹ Other factors were also relevant to the decision.² None the less, the resolution of 1 September 1951 may be taken as authority for the proposition that where a general armistice has in fact led to a *de facto* state of peace, belligerent rights are no longer available. The Security Council noted that its previous resolution referring to the armistice agreements had contained pledges against 'any further acts of hostility'³, and that in another resolution it had reminded the States concerned that the agreements contemplated 'the return of permanent peace in Palestine'.⁴ In consequence, the Security Council found that

'since the armistice regime, which has been in existence for nearly 2½ years, is of a permanent character, neither party can reasonably assert that it is actively a belligerent or requires to exercise the right of visit, search and seizure for any legitimate purpose of self-defence.'⁵

Obiter to this finding, but of considerable interest, are the later statements of the representative of Peru, who advanced the opinion that the United Nations Charter establishes a universal legal order which excludes the old concepts of belligerency—the only justifiable use of force by individual States being in self-defence or as authorized sanctions. As the right of self-defence may only be exercised until action is taken by the Security Council or General Assembly to maintain peace it could not apply here; nor was the concept of belligerency applicable if the United Nations machinery was fully in operation, and *a fortiori* in cases where a conflict had already given rise to United Nations intervention and where hostilities have been terminated as a result of a general armistice concluded under United Nations auspices. An armistice under United Nations auspices establishes a legal situation in which the provisions of the Charter have been applied, and the concept of belligerency is clearly inapplicable in such a context.⁶ Moreover, the practice of the United Nations indicates that the

¹ See statement of United Kingdom delegate, *S.C.O.R.*, 6th year, 550th meeting.

² The most important of which was the discussion revolving around the legal status of the Suez Canal, Egypt maintaining that Article 8 of the Constantinople Convention gave it the right to take necessary measures in self-defence, and other States preferring the view that the primary purpose of the Convention was to guarantee free passage for all ships through the Canal. The Belgian representative noted that in *The Wimbledon*, *P.C.I.J.* A, No. 1, (1923), the Court had observed that under the régime of the Constantinople Convention, belligerent men-of-war and ships carrying contraband had been permitted to pass freely through the Canal. The Court had added, however, that the right of self-defence was reserved to the riparian State 'up to a certain point', without stating what it meant by this expression. *S.C.O.R.*, 9th year, 682nd meeting.

³ Security Council Resolution S/1376, 11 August 1949.

⁴ Security Council Resolution S/1907, 17 November 1950, *S.C.O.R.*, 5th year, Suppl., September–December.

⁵ Security Council Resolution S/2322, 1 September 1951.

⁶ *S.C.O.R.*, 9th year, 688th meeting, pp. 5–6. He also cited as proof of the death of the classical notions of belligerency the fact that the intervention in Korea by Chinese 'volunteers'—purportedly permitted under the Hague Convention of 1907—was not accepted, and indeed, at that time, the delegation of Peru had observed that between 1907 and 1945 there had been a radical change in the outlook of mankind, and especially in its juridical concepts.

traditional doctrine that an armistice does not affect the status of war is being replaced by a doctrine under which an armistice is a *de facto* termination of war, 'which is later consummated and completed by the final treaty of peace'.¹ The Korean armistice of 8 June 1953 followed this trend; and it is significant that on the two occasions upon which the United Nations has agreed to a halt to hostilities in Katanga (U.N. Docs. S/5003, S/5009, 27 and 30 November respectively) it has chosen not to use the method of armistice, but rather those of cease-fire in one case and a unilateral withholding of fire in the other.

(iv) *That force has been used in self-help*

Self-help, like self-defence, is dependent upon a prior illegal act by the State against which it is directed. The distinction lies in that self-defence, which operates to protect a State against irreparable harm where no other means are available, aims at the restoration of the *status quo*, whereas self-help has a 'remedial or repressive character in order to enforce legal rights'.²

There is little doubt that the Charter has prohibited self-help as a form of force legally available to an individual State. Article 2 (4) prohibits the State's right to use or threaten force, and the Security Council is given the primary responsibility for the maintenance of international peace and security. Moreover, under Article 25 all members agree to accept the Security Council's decisions, and the only express reservation of a right of force is that of self-defence under Article 51. The principle *expressio unius est exclusio alterius* would seem to apply here, especially in the light of the drafting history of these provisions. This contention is upheld by the *Corfu Channel* case. The United Kingdom argued, with regard to its minesweeping operations, that it was justified in protecting its legal position against Albania, and in violating Albania's sovereignty, if necessary, to obtain and present evidence.³ The Court completely rejected this argument.⁴ Nor did it accept the argument that a minefield obstructing the right of passage in an international water is an 'international nuisance' which an interested party may remedy, even within territorial waters, if the riparian State is unable or unwilling to do so. It may thus be deduced that forcible self-help for the purpose of obtaining rights already violated is illegal.⁵

¹ Stone, *Legal Controls of International Conflict* (1959), at p. 644.

² Bowett, *Self-defence in International Law*, at p. 11.

³ *I.C.J. Pleadings*, 1950, vol. 3, p. 296.

⁴ *I.C.J. Reports*, 1950, p. 35.

⁵ Though the Court permitted forceful action in self-defence—namely the passage of ships at action stations through the Strait, passage having previously been obstructed by mines, there being a danger of repetition of such hostility. Waldock, *loc. cit.* at p. 501, notes that the demonstration of force was not merely to ensure the safe exercise of the right of passage, but to coerce the wrongdoer into future good behaviour, and that this seems to come very close to

(v) *That force has been used in reprisal or retaliation*

In classical law it was accepted that a State could seek to obtain satisfaction by force for the consequences of the illegal acts of another State if that State refused to make amends for its conduct. As with self-defence, reprisals required that first there must have been a breach of international law, and the action taken was to be proportionate to the wrong done.¹ The distinction between reprisals and retaliation, or retorsion, is very fine, and frequently they are used synonymously.²

It is now generally considered that reprisals involving the use or threat of force are illegal.³ The remedying of international wrongs no longer lies within the jurisdiction of individual States, but can only be accomplished by peaceful procedures or by the authority of the United Nations.

United Nations practice clearly upholds this desirable development. The Secretary-General, commenting on the legal status of the Arab-Israeli Armistice Agreements, stated: 'The reservation as to self-defence does not permit acts of retaliation, which have repeatedly been condemned by the Security Council.'⁴ Furthermore, both the Qibya and Tiberian incidents confirm the Security Council's position on this point. With reference to action at Qibya by Israeli forces, the justification pleaded being retaliation, the Security Council expressly found that retaliatory action was both contrary to the cease-fire provisions and to Israel's obligations under the Charter.⁵ Even less equivocal was the Security Council resolution of 19 January 1956, condemning the entry of Israeli forces into Syria at Lake Tiberias, which reminded 'the government of Israel that the Council has already condemned military action in breach of the general armistice agreements, whether or not undertaken by way of retaliation'.⁶ allowing forcible self-help. However, this writer prefers the view that the Court was rather interpreting Article 51 broadly by allowing a threat of force in self-defence where there was an imminent probability of armed attack.

¹ The legal nature of non-belligerent reprisals is laid out in the *Naulilaa* case (1929), 8 T.A.M., 409 at 422-3. A third argument is that before resorting to reprisals efforts must have been made to secure redress.

² Stone, *Legal Controls of International Conflict* (1959) at p. 288, suggests that retaliation consists of unfriendly acts whereby one State answers objectionable—but not necessarily illegal—conduct of another State in a retaliatory manner. Normally the primary purpose of reprisals is to secure redress, while a retorsion is generally of a retaliatory nature. A typical example of the former is the Italian bombardment of Corfu in 1923, in order to secure redress from the Greek Government for the murder of General Tellini.

³ Waldock, loc. cit., at p. 493; Jessup, op. cit., at p. 175; Bowett, op. cit., at p. 13; Stone, op. cit., at p. 287; Wehberg, *Recueil des cours*, 1 (1951), pp. 72-73; Schwarzenberger, *Manual of International Law* (1952), at p. 62.

⁴ Report of the Secretary-General pursuant to Security Council Resolution of 4 April 1956, S/3596, S.C.O.R., 11th year, Suppl., April-June 1956, paragraphs 45 and 46.

⁵ Security Council Resolution S/3139/Rev. 2, 24 November 1953, which found 'that the retaliatory action at Qibya taken by armed forces of Israel constitute a violation of the cease fire provisions . . . and are inconsistent with . . . the Charter; [and expressed] the strongest censure of that action'.

⁶ Security Council Resolution S/3538, 19 January 1956, S.C.O.R., 11th year, Suppl., January-March.

Indeed, the Security Council had previously stated that 'no party is permitted to violate the truce on the ground that it is undertaking reprisals or retaliation against the other party'.¹

(vi) *That force is being used to protect vital interests*

Such a claim is much wider than the concept of self-defence, and its dangers are apparent. It leads all too easily to the doctrine of necessity,² which might allow one State gravely to injure another on the grounds of saving its own military, economic or political interests. As has been aptly observed, it is a concept which cannot be kept within proper bounds.³

This claim was, in fact, the main one upon which the United Kingdom based her right to intervene forcefully in the Suez dispute of 1956. In announcing that the United Kingdom Government had sent ultimatums to Israel and Egypt, requesting them to cease hostilities and withdraw from the neighbourhood of the Canal, the United Kingdom delegate emphasized that the fighting threatened freedom of navigation through the Canal, on which Britain's economic life depended.⁴ The Members of the United Nations were overwhelmingly of the opinion that the proper procedure to guarantee such vital rights was through the various means of peaceful settlement provided by the Charter, and that 'the use of force or armed intervention to secure rights, even lawful rights, has been strictly prohibited unless expressly ordered by the Security Council. . . . No country may take the law into its own hands.'⁵

If vital interests other than those of territorial integrity and political independence may not be secured forcefully without the permission of the Security Council, may they be illegally jeopardized by a threat of force, and is such a threat a breach of Article 2 (4)? This interesting question arose—but was never clearly posited, and certainly was never answered—in the case of the Berlin blockade. The rights of the Occupying Powers in the city stemmed from treaty rather than from inherent sovereignty, and to all the parties concerned the rights were—and are—'vital'. In 1948 France, the United Kingdom and the U.S.A. drew attention to the situation caused by the unilateral imposition by the Government of the U.S.S.R. of

¹ *S.C.O.R.*, 3rd year, 354th meeting, pp. 39 et seq.

² A comprehensive study of the classical doctrine of necessity, and all its forms and implications, is to be found in Rodick, *The Doctrine of Necessity in International Law* (1928). The wide range of situations to which the doctrine has been applied is all too significant an indication of the abuses to which it leads.

³ Waldock, loc. cit., at p. 462. He notes that in municipal law it is only self-defence, and not necessity, or self-preservation, which may justify an otherwise criminal use of violence against another person: *R. v. Dudley and Stephens* (1884), 14 Q.B.D. 273; where a threat of death by starvation on a raft did not excuse cannibalism. Also *U.S. v. Holmes*, 1, Wallace Junior, 1; both cited in Brierly, *Law of Nations* (4th ed., 1949), at p. 294.

⁴ *S.C.O.R.*, 11th year, 749th meeting, at p. 3, 751st meeting, at p. 7.

⁵ *Per* the delegate of Columbia, *G.A.O.R.*, 1st emergency special session, 562nd meeting.

restrictions on transport and communications between the Western zone of occupation of Germany and Berlin.¹ It was stressed that not only was this action in conflict with the rights of the Western Powers, but that it was also contrary to the obligation of the Soviet Government under Article 2 of the Charter. From the discussions it was apparent that the reference to Article 2 was in the context of a 'threat of force' which prevented the exercise of legitimate rights.² At no time was it suggested that it was a threat of force against the territorial integrity or political independence of a sovereign State. As the Soviet Union based its refusal to discuss the question on Article 107 of the Charter,³ it never took up the point of whether there could be a breach of Article 2 (4) if the threat of force were aimed at vital interests rather than political independence or territorial integrity. A draft resolution based on Article 40 of the Charter⁴ failed of adoption, after the negative vote of Russia; and an agreement was ultimately reached by the parties concerned outside the United Nations.

(vii) *That force is being used in the protection
of a State's nationals*

The issues raised by this contention are rather more controversial. May a State, if its nationals, or persons with religious affiliation, are in danger at the hands of another State, intervene forcefully against such a State to protect them? In other words, to what does the 'self' of self-defence extend? Does it extend to nationals abroad, or only to domestic territory, to nationals at home and to the armed forces at home and abroad?

In the past, the tendency has been to assume that there is such a right of protection.⁵ It has been assumed by some writers that this is undoubtedly an issue of self-defence, and that if the conditions of *The Caroline* are met, such action must be legal.⁶ The present writer finds this answer facile, as not only does it beg the vital question of whether 'self'-defence does in fact apply to civilian nationals abroad,⁷ but it ignores the issue of whether, in the terms of Article 2 (4) it is 'inconsistent with the purposes of the United

¹ *S.C.O.R.*, 3rd year, S/1020 and Add. 1.

² *Ibid.*, 361st and 362nd meetings.

³ *Ibid.* Article 107 states: 'Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of a signatory to the present Charter, taken or authorised as a result of that war by the governments having responsibility for such action.'

⁴ *S.C.O.R.*, 3rd year, 372nd meeting, S/1048.

⁵ Examples abound of forceful intervention on behalf of nationals: e.g. the use of force by various States to put down the Boxer rebellion of 1900; the intervention by the United States in 1926-7 in the Nicaraguan civil war. See *Memorandum on Right to Protect Citizens in Foreign Countries by Landing Forces*, Department of State, 7 October 1952; Moore, *Digest*, vol. 7, p. 109. For a more recent discussion, see *Proceedings of the 5th Conference of Comparative Law*, Brussels, 4-9 August 1958, especially *per* Vallance.

⁶ Waldock, *loc. cit.*, at p. 467.

⁷ Above, p. 316.

Nations'. The first purpose of the United Nations, as stated in Article 1, is '... to take effective collective measures for the prevention and removal of threats to the peace'; and it may surely be argued that—as has been argued in reference to the treatment of Indian nationals in South Africa¹—the maltreatment of nationals of one State by the authorities of another is a threat to the peace.

The problem may become very acute in that recourse to the United Nations in the hope of instigating collective measures may involve a time-lag which is both vital and tragic to the persons involved. To intervene forcefully on their behalf cannot be deemed an intentional attempt to impair territorial integrity or political independence; but although such action may perhaps be legal under Article 2 (4), and is certainly not an aggression under Article 39, it may well give rise to a 'threat to the peace' under that article. It would thus appear to belong to that category of acts which may be generally legal, but which may be deemed impermissible in a given case.

Certainly no blanket approval can be given to this practice, for like most defences of the use of force, it is sadly open to abuse. Thus the United Kingdom, during the Suez intervention, maintained that it was acting to safeguard British lives²—a palpably inadequate excuse, as British lives were never in danger until the military action by the United Kingdom Government. A similar contention was made by the United States when sending troops to the Lebanon—though the general consensus of opinion is that at no time during the disturbances in the Lebanon were American lives seriously in danger.³ The plea has now been heard again in defence of the return of Belgian paratroops to the Congo after its independence,⁴ and whereas at this stage opinions may still differ as to the objective need for such action, it is apparent that the Belgian move caused a marked deterioration in the stability of the Congo.

A tentative preference of the United Nations for the view that this is not to be accepted as a justification for the use of force is to be found in the Report of the Commission of Investigation into the Greek frontier incidents question. The Yugoslavian representatives had stated that they were concerned for the plight of the Slav minority in Macedonia, and the Commission found that the Greek treatment of the Slavs 'had resulted in unrest

¹ See, for example, statements by the representative of Egypt, *G.A.O.R.*, 7th session, *Ad hoc* Political Committee, 10th meeting, p. 48; and by the representative of the Philippines, *G.A.O.R.*, 8th session, *Ad hoc* Political Committee, 17th meeting, p. 80. India itself, curiously enough, has not classified the situation in these terms, but has always brought it before the U.N. as a situation 'likely to impair friendly relations between two governments', under Article 14.

² *S.C.O.R.*, 11th year, 849th meeting, p. 24.

³ e.g. Wright, 'United States Intervention in the Lebanon', *American Journal of International Law*, 53 (1959), p. 112; Potter, 'Legal Aspects of the Beirut Landing', *ibid.* 52 (1958), p. 127.

⁴ See S/PV/879, p. 97, *per* M. Wigny; and *ibid.*, pp. 6 and 31 for support of this contention.

and discontent'. However, its Report then went on to add: 'That did not, of course, absolve the northern neighbours from responsibility for their support in the Macedonian movements.'¹

(viii) *That the use of force is not an infringement of Article 2 (4)*

As Article 2 (4) forbids the use or threat of force in international relations, a State may argue that the use of force in which it is engaged is an internal, and not an international, matter. This argument links up with the domestic jurisdiction reservation of Article 2 (7). The question usually arises in the context of action by one State against an entity whose statehood it does not acknowledge, but which is recognized by some members of the international community as a State. Thus in the Indonesian situation, the Netherlands denied United Nations jurisdiction, claiming that it was a matter within its own domestic jurisdiction—so that the issue was on the application of Article 39 and Article 2 (7). Had the situation been put before the Security Council in terms of Article 2 (4) it could equally well have been argued that the action of the Netherlands was not a use of force in international relations. In the particular case the United Nations did assert jurisdiction, though the grounds upon which it did so are open to varying interpretations. It seems, however, that where widespread fighting is occurring and there is a large measure of doubt that the matter is truly within the domestic jurisdiction of one party, the United Nations will not interpret statehood too literally, and will not allow hostilities to continue behind the shield of a moot jurisdictional point.

In the Tibetan case the issues have been very blurred. While the Assembly has assumed jurisdiction to discuss the question, in spite of the contention of the communist bloc that Tibet is an integral part of China, it has done so largely on human rights grounds; and has shown little inclination to do more than condemn the suppression of such rights and fundamental freedoms. The military action against the Tibetans, being something of a *fait accompli*, has received little attention.² However, the primary concern of the United Nations with stopping widespread fighting becomes capable of very clear expression where there are not jurisdictional issues of this sort involved. The Arab hostilities against the newly proclaimed State of Israel were defended by the Arab States on the grounds that Article 2 (4) could not apply, as they did not recognize Israel as a 'State'.³ The majority of Members of the Security Council disregarded the question of statehood and, assuming jurisdiction under Article 39, 'concentrated on the fact of

¹ *Report of Commission of Investigation*, Pt. III, chap. 1, p. 110, S/360/Rev. 1, S.C.O.R., 2nd year, Spec. Suppl. No. 2, vol. 1.

² See U.N. Doc. A/4324, G.A.O.R., 14th session, 831st–834th meetings, and General Assembly Resolution 1353 (XIV).

³ S.C.O.R., 3rd year, 292nd–299th meetings.

invasion by states of territories not their own'.¹ In other words, the United Nations will not allow the attacker, by withholding recognition from its victim, to evade the prohibition against the use of force.²

CONCLUSION

Over the last sixteen years most of the traditional issues relevant to the use of force have arisen in United Nations practice, and certain developments are already apparent. Furthermore, new problems have arisen in relation to methods of coercion, and a body of United Nations practice on these points is being built up. What may be learned of the complex legal rules governing the use of force by individual States is not, by and large, to be found in clear-cut, unequivocal resolutions or directives. To hope for such from a political body—albeit one bound by legal rules—is to hope for too much. However, cautiously worded recommendations, views expressed over a period of time by a majority of States, and even the refusal to act, as well as action taken, all add up to provide pointers to the legal limits of the use of force by sovereign States. And it is from such sources, perhaps even more than from treaties and judicial decisions, that the international law governing the use of force by sovereign States will be derived in the future.

¹ Bowett, *Self-defence in International Law*, at p. 153.

² *Ibid.*, at p. 154.

THE COURT OF THE EUROPEAN COMMUNITIES JUDICIAL INTERPRETATION AND INTERNATIONAL ORGANIZATION*

By J. F. McMAHON, LL.B. (CAMBRIDGE), LL.M. (HARVARD)

Lecturer in Law, Lincoln College, Oxford

Introduction

It is customary, in the constitutive instrument of an international organization, to vest in an appropriate body jurisdiction concerning questions involving interpretation of that instrument. In the case of the European Communities the appropriate body is the Court, whose function is to ensure the rule of law in the interpretation and application of the basic treaty of each of the three Communities.¹ However, judicial interpretation of the charter of an international organization is the exception rather than the rule. The Charter of the United Nations, following the example of the Covenant of the League, contains no provisions for the authoritative interpretation of its basic instrument.² Many of the specialized agencies, although they may make a small genuflection in the direction of the International Court,³ will usually refer disputes concerning their charter to a non-judicial organ such as the Executive Directors,⁴ the Board of Governors,⁵ the Council,⁶ the Assembly,⁷ the Congress⁸ or the General Conference.⁹

The reasons for such lack of enthusiasm among States for referring every

* © J. F. McMahon, 1962.

¹ The European Coal and Steel Community Treaty, Article 31. The European Economic Community Treaty, Article 164. The Euratom Community Treaty, Article 134.

² However, under Article 96 (1) of the Charter, the General Assembly or Security Council may request the International Court to give an advisory opinion 'on any legal question'. Many important advisory opinions, too well known to require enumeration here, have been given by the Court, interpreting the Charter, under this provision. It will also be recalled that the Permanent Court of International Justice gave a number of important judgments concerning the Covenant of the League of Nations and the International Labour Organization.

See also Resolution 171 (11) of 14 November 1947, *General Assembly, Official Records* (11), plenary meeting, vol. 2, p. 1559 (A/459): '... considering that it is of paramount importance that the interpretation of the Charter . . . and the Constitutions of the Specialized Agencies should be based on recognized principles of international law . . . recommends as a general rule that States should submit their legal disputes to the International Court of Justice.' See generally Koplemas, *L'Organisation des Nations Unies* (1947), pp. 252-311; Pollux, 'The Interpretation of the Charter', this *Year Book*, 23 (1946), p. 54.

³ I.L.O. Treaty, Article 37 (1); W.H.O. Treaty, Article 75; I.M.C.O. Treaty, Article 55; F.A.O. Treaty, Article 16 (1); U.N.E.S.C.O. Treaty, Article 14 (2). See generally Jenks, 'The Status of International Organizations in relation to the International Court of Justice', *Transactions of the Grotius Society*, 32 (1947), pp. 1-41.

⁴ Ibid. (b).

⁵ W.H.O., Article 75.

⁶ F.A.O., Article 16 (1).

⁷ I.M.F., Article 18 (a).

⁸ I.C.A.O., Article 84.

⁹ W.M.O., Article 29.

dispute concerning the basic instrument of an international organization to a judicial organ, are not difficult to discover. Sometimes, as with the International Monetary Fund, the technical nature of the organization may render it unsuitable for judicial control.¹ More often, however, it is the acute need for an informal, flexible and an expeditious method of interpretation that will militate against the concept of judicial control. Nor, in this context, should one underestimate the political sensitivity of States, especially where their vital interests are concerned. As most disputes concerning the interpretation of such an instrument as the United Nations Charter will involve important political considerations (for example, the *Admissions* cases or the question now pending concerning the financial obligations of members), it is not surprising that States are unwilling to commit themselves in advance to submitting such questions for an authoritative judicial decision.

Many conflicts of opinion concerning the meaning of a particular provision of the basic instrument of an international organization will be settled by informal discussion and consultation without the necessity for an authoritative interpretation. It is also important to note that the routine, day-to-day application of the contents of a constitutive instrument will inevitably involve its interpretation, as was indeed pointed out at the San Francisco Conference:²

'In the course of the operations from day to day of the various organs of the Organization, it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions. This process is inherent in the functioning of any body which operates under an instrument defining its functions and powers. . . . Accordingly, it is not necessary to include in the Charter a provision either authorizing or approving the normal operation of this principle.'

It is by means of such practical application and interpretation that the charter of any international organization becomes a viable instrument responding to the needs of an evolving international society and providing scope for change and adaptability. One need only refer to the Uniting for Peace Resolution, the creation of a United Nations Emergency Force, the increasing power of the Secretary-General and the concept of absence and abstention³ in the Security Council to realize to what an appreciable extent

¹ Fawcett, 'The Place of Law in an International Organization', this *Year Book*, 26 (1949), p. 321 at p. 328: 'Three conclusions may be drawn from this discussion . . . the first is that the concept of judicial control is incompatible with the design of the Fund, and that even the indirect control which may be had through advisory opinions of the International Court will not work in an organization which has for technical reasons been made the interpreter of its own constitution.' See also Hexner, 'Interpretation by International Organizations of their Basic Instruments', *American Journal of International Law*, 53 (1959), p. 341; Gold, 'The Interpretation by the I.M.F. of its Articles of Agreement', *International and Comparative Law Quarterly* (1954), p. 256.

² U.N. Conference on International Organization, *Report of Rapporteur*, IV/2, Doc. 933, IV/2/42(2), pp. 7-8. Goodrich and Hambro, *Charter of the United Nations* (1949), pp. 547-51.

³ *Security Council, Official Records*, 2nd year, No. 68, p. 1711: 'It is now jurisprudence in the

the text of the charter of an international organization may be modified or extended by its operation in practice.¹ How far such practice, if not embodied in a formal amendment, is legally binding is an interesting question. It might be difficult to maintain that because the Security Council had followed a certain practice on two or three occasions, such practice should constitute a binding precedent. In two or three cases, however, the International Court of Justice has referred to 'subsequent practice'² when interpreting a provision of the United Nations Charter. Such practice or conduct might also raise some interesting points concerning the applicability of the doctrine of estoppel³ and the growth of customary law within an international organization.

The above remarks presuppose the necessity of interpreting the basic instrument of an international organization and such a necessity always exists. The words used in the drafting of the instrument are rarely precise or susceptible of a single meaning; nor is it possible to envisage and provide against every situation in which the charter of an organization will have to apply.

It is frequently stated that the object of interpretation is to discover the intentions of the parties.⁴ However, Judge Lauterpacht has indicated⁵ at least five different situations when it could be said that no such intentions existed and had to be 'implied', 'imputed' or 'presumed'. Even if such intentions exist, the fact that a dispute arises as to what they are indicates that they cannot have been expressed in an unambiguous manner. Nor is it clear to whom the word 'party' refers in this context; the plenipotentiaries who drafted the constitutive instrument, or the Governments that ratified it. In any case, one is likely to be dealing with forty or fifty parties. It is also pertinent to ask where one is to find the intentions of the parties if not in the text itself. Nor is there only one 'true' interpretation of a disputed text. As Kelsen says:

'The function of authentic interpretation is not to determine the true meaning of the legal norm thus interpreted, but to render binding one of the several meanings of a legal norm, all equally possible from a logical point of view. The choice of interpretations as a law-making act is determined by political motives. It is not the logically

Security Council . . . and the interpretation accepted for a long time . . . that an abstention is not considered a veto.'

¹ Vallat, 'The Competence of the United Nations General Assembly', *Recueil des cours* (1959—II), p. 203; Engel, 'The Changing Charter of the United Nations', *The Yearbook of World Affairs* (1953), pp. 71—101.

² *International Status of South-West Africa*, I.C.J. Reports, 1950, p. 136; *Competence of the General Assembly regarding Admission to the United Nations*, *ibid.*, p. 9; *Competence of the International Labour Organization*, P.C.I.J., 1922, Series B, No. 2, p. 41.

³ Lauterpacht, *The Development of International Law by the International Court* (1958), p. 170.

⁴ *Annuaire de l'Institut de Droit International*, 43 (1950), p. 420.

⁵ Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties', *this Year Book*, 26 (1949), p. 76.

"true", it is the politically preferable meaning of the interpreted norm which becomes binding.¹

However, a judge does not have unlimited legal discretion in this matter, and traditional jurisprudence distinguishes various principles of interpretation which will normally be invoked. One may mention the plain, ordinary, 'natural' meaning principle; the effective principle, the restrictive principle, the teleological principle, the integration principle, the subsequent practice principle, the emergent purpose principle and the use of *travaux préparatoires*.² It will be readily appreciated that an astute merger of any two of the above principles may substantiate almost any conclusion the judge has reached independently of their assistance and that the application of the effective or the restrictive principle may well yield a contradictory result. As Lauterpacht says, such principles will frequently only be the form in which the judge cloaks a decision already reached by other means:

'It is elegant . . . and it inspires confidence . . . to give the garb of an established rule of interpretation to a conclusion reached as to the meaning of a statute, of a contract, or of a treaty.'³

The hollow fiction of the intentions of the parties is all the more difficult to sustain in regard to the constitutive instrument of an international organization. Such a treaty, if it is to prove effective, must inevitably develop a life of its own, often totally different from the concept of its founders. The teleological principle of interpretation is ideally suited to this purpose. One may now turn to the jurisprudence of the Court of the European Communities to examine by what principles that Court has been guided in interpreting the constitutive instrument of each Community.

✓ *The nature of the Court of Justice of the European Communities*

✦ The Court of the European Coal and Steel Community was replaced in October 1958 by the Court of the European Communities. The present Court, like the European Parliament, is an institution common to all three Communities; a sort of pledge of more unity to come.⁴ As, at the time of writing, the only cases decided under the European Economic Community Treaty have been two appeals lodged by public servants against their dismissal, this article is principally concerned with the jurisprudence arising from interpretation of the European Coal and Steel Community Treaty,

¹ Kelsen, *The Law of the United Nations* (1950), p. xv.

² Fitzmaurice, 'The Law and Procedure of the International Court of Justice', this *Year Book*, 33 (1957), pp. 203-38. See also *American Journal of International Law*, 27 (1937), Suppl., pp. 937-77; Stone, 'Fictional Elements in Treaty Interpretation—a Study in the International Judicial Process', *Sydney Law Review*, 1 (1953-4), pp. 344-68.

³ Lauterpacht, *op. cit.*, p. 53.

⁴ Professor A. M. Donner, 'The Court of Justice of the European Communities', *International and Comparative Law Quarterly*, Supplementary Publication No. 1 (1961), p. 68.

concerning which nearly one hundred judgments have been rendered.¹ However, there can be little doubt that a Court, now responsible for interpreting the three constitutive treaties, all of which are concerned with closer European integration, will seize the opportunity to strengthen such efforts towards integration by the unity of its jurisprudence in their interpretation and by the formulation of a Community law.

The function of the Court, as already stated,² is to ensure the rule of law³ in the interpretation and application of the basic treaty of each of the three Communities. Parties who may appear before the Court are: States, the High Authority, the Commissions and Councils of Ministers,⁴ Enterprises, Associations and Individuals.⁵ The four grounds of appeal,⁶ namely incompetence, violation of a substantial procedural requirement, violation of the Treaty or of any rule of law concerning its application, and *détournement de pouvoir*, are the same as the grounds which may be alleged in the French Conseil d'État against a French administrative action. This similarity to French administrative law is no mere chance, for it is precisely as the administrative tribunal of the Communities, reviewing the legality of the legislative acts of the High Authority, the two Commissions and the three Councils of Ministers, that the importance and principal task of the

¹ The judgments of the Court are published in French in the *Recueil de la jurisprudence de la Cour*, hereafter referred to as *Recueil*. The two appeals mentioned earlier in this sentence are: *Eva von Lachmüller, Bernard Peuvrier, Roger Ehrhardt c. Commission de la C.E.E.*, *Recueil*, 6/2 (1960), p. 933; *Rudolf Pieter Marie Fiddlelaar c. Commission de la C.E.E.*, *Recueil*, 6 (1960), p. 1077.

² Above, p. 320.

³ Valentine, *Court of Justice of the European Coal and Steel Community* (1955), p. 56: 'It is not clear whether the words "shall ensure the rule of law" are to be taken as meaning that the Court is to be guided by the general principles of international law, and is to subordinate the interpretation and application of the Treaty to these principles; or whether the phrase has a more restricted sense and merely implies that in the interpretation of the Treaty, the Court is to be bound by recognized rules of interpretation and that the application of the Treaty shall be subordinate to the law as set out in the Treaty thus interpreted.'

⁴ E.C.S.C. Treaty, Article 33, paragraph 1: 'The Court is competent to pronounce upon appeals for annulment for incompetence, violation of a substantial procedural requirement, violation of the Treaty or of any rule of law concerning its application or for *détournement de pouvoir* brought against the decisions and recommendations of the High Authority by one of the member States or by the Council.' E.E.C. Treaty, Article 173, paragraph 1; Euratom Treaty Article 146, paragraph 1: 'The Court of Justice shall determine upon the legality of the acts of the Council and of the Commission other than recommendations and opinions. To this effect, it is competent to pronounce upon appeals for incompetence, violation of substantial procedural requirements, violation of the present Treaty or of any rule of law concerning its application, or for *détournement de pouvoir* brought by a member State, the Council or the Commission.'

⁵ E.C.S.C. Treaty, Article 33, paragraph 2: 'Enterprises or associations referred to in Article 48 may, under the same conditions, bring an appeal against individual decisions and recommendations concerning them or against general decisions and recommendations which they believe vitiated by a *détournement de pouvoir* with respect to them.' E.E.C. Treaty, Article 173, paragraph 2; Euratom Treaty, Article 146, paragraph 2: 'Any natural or legal person may bring, under the same conditions, an appeal against decisions of which he is the recipient and against decisions which, although taken under the appearance of a regulation or of a decision addressed to another person, concern him directly and individually.'

⁶ E.C.S.C. Treaty, Article 33, paragraph 2.

Court is to be found.¹ However, this task is not exclusively an administrative one, for the treaties, more particularly that of the Coal and Steel Community, also vest jurisdiction in the Court concerning matters of discipline,² the use of the veto,³ imposition of pecuniary sanctions,⁴ revision of the Treaty,⁵ delictual and contractual liability,⁶ assessment of economic facts and circumstances,⁷ and points involving international law.⁸ This brief survey of the competence of the Court should quickly dispel any idea of classifying it under one of the traditional headings of international law.⁹

The domestic courts of the various member countries will also have occasion to interpret the community Treaties. By virtue of their ratification of the Treaties (some member States such as the Netherlands and Luxembourg even amended their constitutions to avoid future constitutional difficulties), the Community law embodied in these Treaties is now a part of the municipal law of each member State and thus falls within the competence of the domestic courts. This competence is, however, a limited one. In the Coal and Steel Community the domestic courts are obliged by Article 41 of the Treaty to refer to the Court of Justice of the Communities for a ruling on the validity of resolutions of the High Authority or of the Council, should this be contested before them. On the other hand, the domestic courts are competent to interpret the Treaty and the acts of the common Institutions directly. This lacuna has been filled in the other two Communities. Article 177 of the European Economic Community Treaty—to which Article 150 of the Euratom Treaty corresponds exactly—provides for reference to the Court of Justice for preliminary determination of questions raised before a domestic court or tribunal in connexion, not only with the validity of the acts of the common Institutions, but also with the interpretation of the Treaty. However, such reference is only imposed on domestic courts from whose decisions no appeal lies under municipal law. It is interesting to note that municipal courts have already made an appreciable contribution to the elaboration of Community law and that about fifteen cases have so far been the subject of decisions before them, some of which have not yet become executory.¹⁰

¹ See Valentine, 'The Jurisdiction of the Court of Justice of the European Communities to Annul Executive Actions', this *Year Book*, 36 (1960), p. 174.

² E.C.S.C. Treaty, Article 12. Twenty-three out of the hundred articles in the E.C.S.C. Treaty make some reference to the Court.

³ Ibid., Article 10.

⁴ Ibid., Articles 36 and 66, paragraph 6. ⁵ Ibid., Article 95. ⁶ Ibid., Articles 40, 42, 43.

⁷ This power is strictly limited by Article 33 of the E.C.S.C. Treaty. However, that article provides for certain exceptions; see also Articles 36; 66, paragraphs 5 and 6; 95; and 88.

⁸ E.C.S.C. Treaty, Article 89; E.E.C. Treaty, Article 182; Euratom Treaty, Article 170.

⁹ See Bebr, 'The Development of a Community Law by the Court of the European Coal and Steel Community', *Minnesota Law Review* (1957-8), p. 845. The author wishes to acknowledge that he is much indebted in this article (and in his article on the 'Court of Justice of the European Communities' in the *Journal of Common Market Studies*, July 1962) to the above most valuable article by Mr. G. Bebr.

¹⁰ See Gaudet, 'The Common Market and the Law', *Community Topics*, No. 4.

The Community treaties make frequent references to municipal law¹ and there is no doubt that the treaties involve a substantial penetration into the municipal sphere.

'On certain matters at least, the Common Market requires really common rules known to all people and enterprises concerned, and each Member State cannot remain free to decide whether, when and how its national law should be modified . . . the Member States have agreed to lay down on specified matters a law of the Community, directly binding and applied as national law within each Member State and subject to sovereign interpretation by the single Court of Justice of the Communities. As aforesaid, the basic law of the Communities, more or less detailed, is laid down in the Treaties themselves. But it has to be completed, possibly adapted, anyhow implemented and applied to individual cases. Within the limits of competence and under the conditions of procedure determined by the Treaties for each matter, the Council and the executive bodies are entitled to do so. They are empowered to make regulations which bind everyone in the community.'²

Such regulations may be issued under Articles 58, 79 and 85 of the European Economic Community. Most of the provisions, however, are not self-executing and merely oblige the member States to take appropriate measures in their municipal law for the fulfilment of their obligations. Only in very rare cases will the Court apply municipal law directly;³ nor will it attempt to decide whether a particular regulation of the High Authority violates municipal law or the constitution of one of the member States.⁴

An important effect of the Community treaties in the municipal sphere will be the necessity to rationalize and harmonize the principles of law in the various member countries. This fact is recognized in the European Economic Community Treaty which devotes two of its articles to what it calls 'approximation of laws'.⁵ It is interesting to note in this respect that there was a meeting of non-governmental experts at Paris, in June 1960, which resulted in the formulation of concrete proposals for a convention on the formation of a company of European type.⁶

This gradual approximation of law, however, will have to take place both in the field of legislation and in the jurisprudence of the courts. The Court of the European Communities is not itself concerned with private international

¹ E.C.S.C. Treaty, Articles 6, paragraph 3; 43, paragraph 2; 51, paragraph 1; 52, paragraphs 1 and 2; 59, paragraph 3; 67, paragraphs 1, 2 and 3; 68, paragraphs 1, 2 and 3; 69, paragraphs 1 and 4; 70, paragraphs 2, 3, 4 and 5; 71, paragraph 1; 72; 73; 74, paragraph 3; 75, paragraphs 1 and 2; 86; 90; 96.

² Gaudet, 'The Legal Framework of the Community', *International and Comparative Law Quarterly* (1961), Suppl., No. 1, p. 15.

³ *Friedrich Stork et C^{ie} c. Haute Autorité*, *Recueil*, 5 (1958-9), p. 63.

⁴ *Comptoirs de vente du charbon de la Ruhr 'Präsident', 'Geitling', 'Mausegatt' et Entreprise I, Nold KG c. Haute Autorité de la C.E.C.A.*, *Recueil*, 6/2 (1960), p. 890.

⁵ E.E.C. Treaty, Articles 100 and 101. See Berb, 'The Relation of the European Coal and Steel Community Law to the Law of the Member States. A Peculiar Legal Symbiosis', *Columbia Law Review*, 58 (1958), p. 767.

⁶ Thompson, 'The Project for a Commercial Company of European Type', *International and Comparative Law Quarterly* (1961), p. 85.

law and that question has only been invoked on one occasion before the Court.¹ In this connexion one might refer to Article 215 of the European Economic Community, which provides that:

'The contractual responsibility of the Community shall be governed by the law applying to the contract in question. As regards non-contractual responsibility, the Community must, in conformity with the general principles common to the laws of Member States, make good any damage caused by its institutions or by its agents in the discharge of their duties.'

Some measure of harmonization of private international law will, of course, be required on the municipal level. If, for example, a person is regarded as French in Italy he will then enjoy the status of a national of a member State and, as such, will benefit from all the advantages of the Common Market. But if under the German law of nationality this same person may be declared to be Swiss and so barred from these advantages in Germany, an absurd and intolerable discrimination will arise.²

In striking contrast to the Statute of the International Court of Justice,³ none of the Community treaties refer to the sources of law which the European Court must apply when interpreting each basic treaty. It would be unreasonable to presume that such omission was due to mere negligence; a more likely explanation is that the three Communities were such an unprecedented and complex legal venture that it was thought expedient not to fetter the Court in advance but, 'laisser de droit de la Communauté puiser aux sources dont il aura besoin avec assez de liberté'.⁴ Nor, according to either international law or municipal law, may the Court pronounce a *non liquet* and so dismiss the case.⁵ In fact, however, an analysis of the practice of the Court reveals that there is no danger that it will ever be at a loss for a 'source of law'; the richness and diversity of the sources it has drawn upon are remarkable.

Of course, the three constitutive treaties themselves⁶ are the fountain-head of the Court's law. Together with these treaties one must mention the regulations, decisions and directives issued by the Councils, Commissions and the High Authority; on the occasions when such regulations are self-

¹ *Mannesmann AG et autres c. Haute Autorité*, *Recueil*, 6/1 (1960), p. 322: 'Nous croyons toutefois ne pas devoir entrer jusque dans les détails de cette question de droit international privé . . . Il suffit donc, à notre avis, de constater si l'appréciation des faits en cause nous conduirait aux mêmes résultats dans les deux droits. Il semble que ce soit le cas.'

² See Gaudet, 'The Common Market and the Law', *Community Topics*, No. 4.

³ Article 38.

⁴ Reuter, *La Communauté européenne du charbon et de l'acier* (1953), p. 89. See generally, Mathijssen, *Droit de la communauté européenne* (1957), p. 4.

⁵ *Fédération charbonnière de Belgique c. Haute Autorité*, *Recueil* 2 (1955-6), p. 264: 'Il faut donc se livrer à une exégèse pour combler cette lacune. Bien que le Code Napoléon ne soit pas applicable ici, nous ne pouvons pas ne pas rappeler son Article 4, aux termes duquel 'le juge qui refusera de juger,' sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice.'

⁶ This will include the annexes and protocols referred to by the treaties.

executing they too will constitute a source of law. Thirdly, the municipal laws, municipal decisions (especially the decisions of the Conseil d'État),¹ and textbook writers² of the member States form a fertile and most vital source of law for the Court. Such laws and decisions are not applied directly. However, faced with the necessity of interpreting in the Treaty such a concept as *détournement de pouvoir*, the Court examines the jurisprudence of the member States relating to this concept and extrapolates those principles common to most of the States. This common denominator then becomes the Community law.³ International law is rarely cited.⁴

‘Quant aux sources de ce droit, rien ne s’oppose évidemment à ce qu’on les recherche, le cas échéant, dans le droit international, mais normalement, et le plus souvent, on les trouvera plutôt dans le droit interne des divers États membres. . . .’⁵

The laws of municipal systems other than those of the member States are equally seldom mentioned; only one reference has been made to English law⁶ and one to American law.⁷ Finally, the Court frequently refers to its own jurisprudence, as formulated in previous decisions. However, there is no law of precedent and the Court, being a court of last instance, is at liberty to change its opinions, although it will rarely acknowledge that it is doing so.⁸

It is interesting to note that in the very first case the Court decided concerning the European Economic Community Treaty, many of the above sources of law were invoked:

‘Les parties ont exposé de façon approfondie leurs conceptions divergentes en matière de droit applicable; elles invoquent le traité instituant la C.E.E., le statut du personnel et le règlement général de la C.E.C.A., les décisions de la Commission économique européenne et du Conseil de ministres, la jurisprudence de la Cour dans les affaires de personnel, le droit belge du travail en tant que “jus loci et” les principes généraux de droit en vigueur dans les États membres.’⁹

It is an altogether idle pursuit to attempt to characterize the three Communities as a federation¹⁰ or as supra-national¹¹ organizations; to ascertain

¹ *De Gezamenlijke Steenkolenmijnen in Limburg c. Haute Autorité*, Recueil, 5 (1958-9), p. 36.

² *Friedrich Stork et C^{ie} c. Haute Autorité*, *ibid.*, p. 83.

³ *Associazione Industrie Siderurgiche Italiane (ASSIDER) c. Haute Autorité*, Recueil, 1 (1954-5), p. 149.

⁴ *Ibid.*, p. 291. See also *Chambre syndicale de la sidérurgie de l’est de la France et autres c. Haute Autorité*, Recueil, 6/2 (1960), p. 652: ‘Nous estimons que si cette théorie est de mise en droit des gens, elle n’est pas valable pour le droit de la Communauté, donc pour une communauté qui se distingue fondamentalement des unions habituelles du droit des gens.’

⁵ *Fédération charbonnière de Belgique c. Haute Autorité*, Recueil, 2 (1955-6), p. 263.

⁶ *Hamborner Bergbau Ab Friedrich Thyssen Bergbau AG c. Haute Autorité*, Recueil, 6 (1960) p. 1049. ⁷ *Barbara Erzbergbau AG et autres c. Haute Autorité*, Recueil, 6/1 (1960), p. 386.

⁸ Donner, *loc. cit.*, p. 68.

⁹ *Eva von Lachmüller, Bernard Peuvrier, Roger Ehrhardt c. Commission de la Communauté Économique Européenne*, Recueil, 6/2 (1960), p. 967.

¹⁰ See Lagrange, ‘L’Ordre juridique de la C.E.C.A.’, *Revue du droit public*, 74 (1958), pp. 362-3.

¹¹ Schumann, Préface à l’ouvrage de Reuter, *La Communauté européenne du charbon et de l’acier*, (1953), p. 7.

their true nature one must examine the exact powers given and reserved in each case, and the use of emotive words will not help to solve the problem. It is pertinent, however, to ask to what extent the Court of the Communities is an International Court of Justice. The origins, powers and objectives of the three Communities are all to be found in international treaties. It is the function of the Court to interpret these international treaties. The Communities themselves are international organizations, possessing international personality,¹ and are subjects of international law. States may be parties before the Court and the Court has jurisdiction in 'any dispute among member States concerning the application of this Treaty . . .'.² De Visscher, recognizing these international aspects of the Court, refers to it as applying a 'droit international spécial',³ somewhere in between traditional international law and municipal law.

However, although the Communities were brought into being in the form of an international treaty, one should not allow the circumstances of their birth to obscure their real nature as organs of economic legislation, nor the function of the Court as an administrative tribunal. The Court of the European Communities more closely resembles the French Conseil d'État⁴ and the four grounds of appeal are the same as the grounds which may be alleged in the Conseil d'État against a French administrative action. It will be recalled that the principal parties appearing before the Court are the High Authority, the Councils and Commissions, associations and enterprises, and individuals. The competence of the Court includes civil, constitutional and disciplinary as well as administrative matters. Reference has also been made to its limited competence to assess and evaluate economic facts and circumstances, and the extent to which it draws upon the municipal laws of the member States for its sources of law. One is not surprised, therefore, to read in the jurisprudence of the Court that 'notre Cour n'est pas une juridiction internationale, mais la juridiction d'une Communauté créée par six États . . .'.⁵ Nor does the operation of the Court much resemble that of the International Court of Justice:

'Peut-être suffit-il de rappeler encore une fois la situation de notre Cour: elle ne connaît ni juges ad hoc, ni nationalités, ni opinions dissidents, mais seulement des juges de notre Communauté européenne dont les arrêts sont immédiatement exécutoires sans procédure d'exequatur portant sur le fond, et elle impose ainsi le respect du droit de la Communauté.'⁶

¹ Congrès international d'études sur la Communauté européenne du charbon et de l'acier *Rapport de Paul de Visscher, Actes officiels*, 2 (1957), pp. 38-39.

² E.C.S.C. Treaty, Article 89; E.E.C. Treaty, Article 182; Euratom Treaty, Article 170.

³ *Rapport de Paul de Visscher*, op. cit., p. 36.

⁴ See the ratification debates concerning the E.C.S.C. Treaty. Coste-Floret, Rapporteur of the Foreign Affairs Commission, *Assemblée Nationale, Official Reports* (1951), p. 8855, col. 1. 'If I wished to define this new organ in a single word, I would say that it is a Conseil d'État.'

⁵ *Fédération charbonnière de Belgique c. Haute Autorité, Recueil*, 2 (1955-6), p. 263.

⁶ *Gouvernement du royaume des Pays-Bas c. Haute Autorité, Recueil*, 1 (1955), p. 232.

In its work the Court is assisted by two court advocates. Their function is patterned after the French Commissaire du Gouvernement at the Conseil d'État. Court advocates are neither judges nor public prosecutors; nor do they participate in the deliberations of the Court or vote. Their principal function is to prepare an opinion for the Court on the legal aspects of any questions submitted to it. Such opinion is not part of the judgment itself; nor is it bound to be accepted by the Court.¹ However, there is no doubt that such opinion strongly influences the Court and the development of the law of the Community and we shall frequently have occasion to refer to it.

Doctrine of the Court of Justice of the European communities and interpretation (A)

In the judgments of the Court one rarely finds any theoretical discussion concerning the principles of interpretation to be applied. No doubt the Court wishes to avoid taking any doctrinal position which might severely limit its freedom of action in the future. However, in contrast to the austerity of the Court's judgments, one may find an elaborate and fertile source of speculation in the conclusions of the Advocate-General.

In accordance with the usual canons of interpretation, the Court will not attempt to interpret a text which is quite clear:

'Mais, toute la question est précisément de savoir si le texte est clair et n'a pas besoin d'interprétation.'²

And again:

'Mais, Messieurs, il nous paraît inutile d'engager une discussion doctrinale sur ce point, car, qu'il s'agisse de . . . Traités internationaux ou de lois internes, il est un principe communément admis et auquel nous nous sommes déjà référés, c'est qu'il n'y a lieu à interprétation et à recherche de l'intention présumée des auteurs du texte qu'en cas d'obscurité ou d'ambiguïté et que la lettre lorsqu'elle est formelle doit toujours prévaloir.'³

Apart from the classical remark, 'En effet, d'une part la volonté commune (la commune intention des parties) qui doit être le fondement de l'interprétation . . .',⁴ one finds few references to the 'intentions of the parties'. This fact is not to be altogether regretted, for as mentioned in the introduction to this article, the Court and the parties may adopt one of several possible interpretations, whichever one serves them best, and may then maintain that such interpretation 'conforme à la volonté de ses rédacteurs'⁵ or that 'l'intention des auteurs paraît donc incontestable',⁶ whilst

¹ Bebr, loc. cit., p. 849.

² *Fédération charbonnière de Belgique c. Haute Autorité*, Recueil, 2 (1955-6), p. 264.

³ Ibid., p. 263.

⁴ Ibid., p. 264.

⁵ *Groupement des industries sidérurgiques luxembourgeoises c. Haute Autorité*, ibid., p. 77.

⁶ *Associazione Industrie Siderurgiche Italiane (ASSIDER) c. Haute Autorité*, ibid., p. 172.

maintaining at the same time that the interpretation of the other party 'contreviendrait manifestement aux intentions des auteurs de ces textes'.¹ It is for this reason that the occasional references in the jurisprudence of the Court to 'the intentions of the parties' are meaningless.² One case in particular expressly refers to the great difficulties attached to an attempt to ascertain the intentions of the authors of a multilateral treaty.³

There is a good deal of interesting discussion to decide whether the fact that the Court is interpreting an international treaty means that it should adopt a restrictive interpretation:

'Enfin, la méthode d'interprétation stricte ainsi défendue serait celle qui doit toujours prévaloir lorsqu'il s'agit de traités internationaux suivant les usages des juridictions internationales, telles que la cour de La Haye.'⁴

Another argument (well known to international lawyers) pleaded before the Court in favour of a restrictive interpretation, concerned 'derogations from State sovereignty' and the principle that restrictions on such sovereignty cannot be lightly presumed⁵ unless they are formally embodied in the text.

'Le Traité repose sur une délégation de souveraineté consentie par les États membres à des institutions supranationales pour un objet strictement déterminé. . . . Le principe juridique qui est à la base du Traité est, un principe de compétence limitée. La Communauté est une personne morale de droit public, et à ce titre elle "jouit de la capacité juridique nécessaire pour exercer ses fonctions et atteindre ses buts" (Art. 6), mais de celle-là seulement.'⁶

Thus, the exact powers and limitations of the various organs of the Community are carefully prescribed.⁷

¹ *Société des fonderies de Pont-à-Mousson c. Haute Autorité*, *Recueil*, 5 (1958-9), pp. 470, 471, 492.

² See *Gouvernement de la république fédérale d'Allemagne c. Haute Autorité*, *Recueil*, 6/1 (1960), pp. 128, 130, 146; *Barbara Erzbergbau AG et autres c. Haute Autorité*, *ibid.*, pp. 403, 407, 430, 434, 441.

³ *Fédération charbonnière de Belgique c. Haute Autorité*, *Recueil*, 2 (1955-6), p. 264: '... la volonté commune . . . est le plus souvent difficile à établir avec certitude pour des actes tels que les conventions internationales qui sont habituellement le résultat de compromis plus ou moins laborieux et où l'obscurité ou le manque de précision de la rédaction ne font souvent que dissimuler des désaccords de base.'

⁴ *Ibid.*, p. 263. See also *ibid.*: 'Nous avons l'impression qu'il n'y a pas en réalité deux doctrines différentes pour interpréter les textes internes et les textes internationaux, mais qu'en fait, les juridictions internationales ont une tendance à être plus timides pour s'écarter de l'application littérale que les tribunaux nationaux, ce qui s'explique aisément.'

⁵ Argued by one of the parties in the *International Labour Organization and the Conditions of Agricultural Labour*, *P.C.I.J.*, Series C, No. 1, p. 174: 'It is a fundamental principle that States, justly jealous of their sovereign prerogatives, do not abandon them willingly and that all limitations of their sovereignty must be formally embodied in the text. One of the great principles of civil law is that in case of doubt, liberty cannot be presumed to have been restricted; a fortiori, when important legal personalities such as States are concerned, it is a principle that in case of doubt, their special attributes, which include not merely liberty, but sovereignty, cannot be considered as having been in any way restricted.'

⁶ *Algera et autres c. Assemblée Commune*, *Recueil*, 3 (1956-7), pp. 159-60.

⁷ See E.C.S.C. Treaty, Article 6: 'The Community shall be represented by its institutions, each one of them acting within the framework of its own powers and responsibilities.'

However, one may find an equal number of statements in favour of a flexible, effective and dynamic approach to interpretation by the Court. One of these,¹ whilst acknowledging that as a matter of form the Community is based on an international treaty, goes on to maintain that in fact its sources of law are taken from municipal law and therefore the rules of municipal law concerning interpretation ought to apply. Such rules will be less restrictive.

In another case² we find the Advocate-General arguing strongly in favour of a teleological approach to interpretation. One of the parties had invoked international law as the appropriate law to interpret the Treaty; to fortify this invocation, the party referred³ to those cases where individuals had been considered subjects of international law, and secondly to those aspects of the Treaty, particularly the requirement of unanimity of the Council of Ministers, which seemed to reflect international law. The Advocate-General rejected both examples as embodying the exception rather than the rule. Instead, he strongly urged the Court to look to municipal law for its principles of interpretation, and secondly to avoid any rigid or literal interpretation of the Treaty which would result in frustrating its whole object:

‘... il fait appel au droit des différents États membres dont il faut tenir compte dans une mesure décisive pour l’interprétation de notre droit communautaire. . . . Dans le problème que vous avez à trancher ici, il s’agit sans aucun doute d’appliquer le droit économique qui est à la base du Traité . . . Le Traité est allé particulièrement loin dans le domaine de la codification juridique des faits économiques . . . Il en résulte que, dans l’application et dans l’interprétation du Traité, il serait dangereux de ne s’en tenir qu’à la lettre de son texte. Pour découvrir les objectifs économiques assignés à telle ou telle disposition particulière, il faut se reporter aux objectifs et aux principes fondamentaux du Traité. Tout récemment dans ses premiers arrêts, la Cour a relevé tout spécialement la portée de ces objectifs généraux et mon éminent collègue Lagrange a insisté dans ses conclusions sur le fait que dans l’exercice de ses pouvoirs, la Haute Autorité ne doit perdre de vue aucun des objectifs du Traité et que, pour atteindre le but visé par une disposition particulière, elle doit éviter de sacrifier un objectif général plus important; il a fait observer que les mêmes principes doivent guider la cour dans l’interprétation du Traité.’⁴

Finally, one may recall what has already been said concerning the need for a dynamic interpretation of a charter and the constitutive instrument of an international organization. It is submitted that the following statement is an excellent illustration of what must be the guiding principle of interpretation for any constitutive treaty:

‘Mais d’abord il n’est pas certain que le Traité doive être interprété restrictivement. Ce principe, déjà discuté lorsqu’il s’agit d’un véritable Traité international, l’est

¹ *Fédération charbonnière de Belgique c. Haute Autorité*, *Recueil*, 2 (1955-6), p. 267.

² *Gouvernement du royaume des Pays-Bas c. Haute Autorité*, *Recueil*, 1 (1954-5), p. 201.

³ *Ibid.*, p. 232.

⁴ *Ibid.*, p. 232.

plus encore lorsqu'il s'agit comme en l'espèce, de la charte créant un organisme supranational. Dans ce cas, les sacrifices de souveraineté consentis par les États signataires ne correspondent pas au strict équilibre synallagmatique du "do ut des" habituel: c'est une mise en commun, une construction nouvelle, dont la vocation, comme celle de toute institution vivante, est de s'épanouir, de croître à partir du germe initial. Le Traité est, en somme, la constitution de l'organisation fédérale embryonnaire qu'il crée. Une constitution ne s'interprète point strictement.¹

In now examining the practice of the Court, we may perceive just how far it has interpreted the constitutions in question restrictively.

Practice of the Court of Justice of the European Communities and interpretation (B)

(a) *Travaux préparatoires*

Although in theory the use of *travaux préparatoires* has been frequently condemned by the International Court of Justice and its predecessor, in practice it has been equally frequently invoked.² The problem is largely related to the question whether the ultimate object of interpretation is to discover the intention of the parties or the meaning of the words which they used. Both Judge Alvarez and Judge Azevedo³ consider the expression 'the intention of the parties' to be a mere figure of speech to which little attention should be paid, and they regard it as a fruitless task to look for such intentions in the negotiations leading to the Treaty.

'... the said conventions must not be interpreted with reference to the preparatory work which preceded them; they are distinct from that work and have acquired a life of their own.'⁴

However, even those who subscribe to the view that the object of interpretation is to discover the intentions of the parties will sometimes deprecate the use of *travaux préparatoires* as unreliable, confused, confusing, inconclusive and merely reflecting the views of the more articulate. Such arguments are all the more cogent in the case of a multilateral treaty establishing an international organization purporting to continue for an unlimited period.⁵

Turning to the practice of the Court of the European Communities, we find, at least concerning the Coal and Steel Community:

'En ce qui concerne le Traité du 18 avril 1951, les travaux préparatoires du Traité lui-même sont pratiquement inexistants ... ou secrets (ce qui revient au même).'⁶

¹ Jeantet, 'Les Intérêts privés devant la Cour de justice de la Communauté européenne du charbon et de l'acier', *Revue de droit public*, 60 (1954), p. 702.

² See Lauterpacht, *The Development of International Law by the International Court* (1958), pp. 116-41.

³ *Competence of the General Assembly for Admission of a State to the United Nations*, I.C.J. Reports, 1950, p. 23: '... it is well known that (according to those who are in favour of using them) the value of *travaux préparatoires* is based, for purposes of interpretation, on the voluntas legislatoris, to which no great importance is attached to-day.'

⁴ Ibid., p. 18.

⁵ E.E.C. Treaty, Article 240.

⁶ *Fédération charbonnière de Belgique c. Haute Autorité*, Recueil, 2 (1955-6), p. 252.

In one or two cases the Court readily admits the validity of access to *travaux préparatoires*,¹ even though such preparatory work must be used with prudence² and must not be allowed to contradict the text if it is clear.³

The ghost of the intent of the parties still continues to exist in a modified form by resort to the governmental reports which accompanied and explained the text of the Treaty when it was submitted to the various Parliaments for ratification. These reports, especially the French one,⁴ are frequently cited and taken note of:

'A notre avis, la Cour devra tenir compte des exposés des motifs des lois de ratification soumises aux Parlements des autres pays.'⁵

And again:

'... nous pourrions invoquer un passage de l'exposé des motifs de la loi luxembourgeoise de ratification qui est ainsi conçu... L'intention des auteurs paraît donc incontestable.'⁶

Thus *travaux préparatoires*, in the guise of the ratification debates, does play a limited role in the interpretative work of the Court.

(b) Community law

Many of the legal concepts embodied in the treaties, such as *faute de service*, *recours en annulation* and *détournement de pouvoir*, are borrowed from municipal law. It is natural therefore that the Court should turn to the jurisprudence of the member States⁷ when interpreting such concepts. It will be convenient to call this process of interpretation 'Community law'.

In its broadest sense the term 'Community law' will connote the law contained in the treaties themselves, the regulations of the High Authority, Councils and Commissions, and all the previous decisions and jurisprudence of the Court. These precedents are not binding. However, one frequently finds such statements as 'selon la jurisprudence constante de la Cour';⁸ or

¹ *Gabriel Simon c. Cour de justice des Communautés Européennes*, *Recueil*, 7 (1961), p. 244.

² *Ibid.*, p. 256: 'D'après les principes d'interprétation généralement admis, il faut faire preuve de la plus grande prudence dans l'usage de travaux préparatoires inédits.'

³ *Ibid.*, p. 244: '... attendu qu'à défaut de travaux préparatoires exprimant clairement l'intention des auteurs de la disposition, la Cour ne peut se baser que sur la portée du texte tel qu'il a été établi et lui donner le sens qui ressort de son interprétation littérale et logique.'

⁴ *Procédure de revision au titre de l'article 95, alinéas 3 et 4 du traité C.E.C.A.* (Avis 1-60), *Recueil*, 6/1 (1960), p. 103.

⁵ *Gouvernement du royaume des Pays-Bas c. Haute Autorité*, *Recueil*, 1 (1954-5), p. 247.

⁶ *Associazione Industrie Siderurgiche Italiane (ASSIDER) c. Haute Autorité*, *ibid.*, p. 172.

⁷ *Gouvernement du royaume des Pays-Bas c. Haute Autorité*, *ibid.*, p. 232: '... il fait appel au droit des différents États membres dont il faut tenir compte dans une mesure décisive pour l'interprétation de notre droit communautaire.'

⁸ *Société nouvelle des usines de Pontlieue-Aciéries du Temple (S.N.U.P.A.T.) c. Haute Autorité*, *Recueil*, 5 (1958-9), p. 300.

'La possibilité d'attaquer par voie de recours cet avis non formel de la Haute Autorité est reconnue par la jurisprudence de la cour (affaires 8-55 et 9-55) . . .';¹

or

'A plusieurs reprises déjà, la Cour a eu à se prononcer sur l'interprétation de la notion de détournement de pouvoir. Elle a adopté une formule de ce genre. . . .'²

It is to the whole of this repertoire of legal principles that the Court refers when it invokes 'le droit des Communautés européennes . . .'³ to interpret some ambiguous provision.

One may, however, use the term 'Community law' to characterize the process by which the Court conducts an analysis and synthesis of the municipal law of the member States. The result of this analysis and synthesis is a 'common law' or 'Community law' which the Court then applies to interpret an ambivalent provision. Given its broad meaning, therefore, 'Community law' includes the whole law of the Community: in its narrower meaning it refers to the process of synthesis by which those principles of law common to the member States become part of the law of the Community. In both its meanings it may be used to interpret the treaties. However, it is with the narrower meaning that we are principally concerned here.

This narrower concept, which really means the general principles of law common to the member States of the European Communities, should be distinguished from the general principles of law recognized by civilized States mentioned in Article 38 of the Statute of the International Court of Justice. The former is confined to Europe; the latter includes legal systems outside Europe. Occasionally one finds the Court referring to 'principes généraux du droit, applicable même sans texte',⁴ or saying 'il faut inclure les principes généraux du droit dans les règles relatives à l'application du traité'⁵ without making it clear to which general principles it is referring. Usually, however, the Court will explicitly state that it is referring to the general principles of the European Communities:

'Il s'agit là des principes juridiques élémentaires communs à tous les États de la Communauté, et qui doivent donc être également accueillis dans le droit communautaire.'⁶

¹ *Phoenix-Rheinrohr AG c. Haute Autorité*, *Recueil*, *ibid.*, pp. 172-7.

² *Firme I. Nold KG c. Haute Autorité*, *ibid.*, p. 143.

³ *Jean-E. Humblet c. État belge*, *Recueil*, 6 (1960), p. 1158.

⁴ *Barbara Erzbergbau AG et autres c. Haute Autorité*, *Recueil*, 6/1 (1960), p. 427.

⁵ *Felten und Guillaume Carlswerk Eisen- und Stahl AG Walzwerke AG c. Haute Autorité*, *Recueil*, 5 (1958-9), pp. 221-2.

⁶ *Mannesmann AG et autres c. Haute Autorité*, *Recueil*, 6/1 (1960), p. 273. See also *Firme I. Nold KG c. Haute Autorité*, *Recueil*, 5 (1958-9), p. 160: 'La Cour n'a compétence pour examiner les actes juridiques qu'à l'aide du droit de la Communauté, mais qu'elle n'est pas obligée de constater les infractions au droit interne. Cela n'exclut pas qu'éventuellement, dans le cadre de l'examen du détournement de pouvoir, il faille aussi respecter des principes élémentaires de droit qui trouvent également leur expression dans des dispositions des constitutions nationales.'

It is also interesting in this respect to note the provision of Article 215 of the European Economic Community Treaty, that concerning non-contractual responsibility, the Community must, 'in conformity with the general principles common to the laws of Member States', make good any damage caused by its institutions.

The Advocate-General in his conclusions often refers to decisions of municipal courts and textbook writers. Reuter¹ is particularly favoured. The decisions of the French Conseil d'État² are frequently invoked, and mention is also made of the decisions of Italian³ and German courts.⁴

It should not be thought that the Court always refers to the law of all the member States. If it regards a particular concept as peculiar to one or two countries, then it will only examine the jurisprudence of those two countries.⁵ Sometimes it will only refer to French law⁶ and to no other. In only a few cases,⁷ however, will the Court ever apply municipal law directly:

'... il ne s'agit pas ici d'appliquer le droit italien ni le droit français ni celui de tout autre pays de la communauté, mais le droit du Traité, et c'est uniquement pour parvenir à l'élaboration de ce droit du Traité que l'étude des solutions juridiques nationales doit être entreprise, chaque fois qu'elle apparaît nécessaire à cette fin.'⁸

Nor is it the function of the Court to decide if a particular regulation of the High Authority violates municipal law⁹ or the fundamental law of the municipal constitution.¹⁰ However, without applying them directly, the Court will sometimes have to take cognizance of the laws in operation in a particular country. If, for example, it is necessary to know whether or not a certain German company has been dissolved, the Court will ascertain those rules of German law governing the dissolution of companies.¹¹

¹ *Friedrich Stork et Cie c. Haute Autorité*, *ibid.*, p. 83.

² *De Gezamenlijke Steenkolenmijnen in Limburg c. Haute Autorité*, *ibid.*, p. 36: 'A titre d'analogie dans les droits nationaux, nous citerons deux arrêts du Conseil d'État français: Merveilleux, 26 mai 1944, Rec. p. 155, et Cerciati, 27 avril 1953, Rec. p. 195.'

³ *Acciaieria Ferriera di Roma (FERAM) c. Haute Autorité*, *ibid.*, p. 527.

⁴ *Acciaieria e Tubificio di Brescia c. Haute Autorité*, *Recueil*, 6/1 (1960), p. 186.

⁵ *Gouvernement du royaume des Pays-Bas c. Haute Autorité*, *Recueil*, 1 (1954-5), p. 288: 'En droit interne, dans les pays de la Communauté, le recours en interprétation n'est connu comme tel qu'en France et en Belgique. ...'

⁶ *Groupement des industries sidérurgiques luxembourgeoises c. Haute Autorité*, *Recueil*, 2 (1955-6), p. 120: 'Il est incontestable que la structure technique du recours en annulation a été empruntée à la procédure contentieuse administrative française.'

⁷ Possibly under Articles 84 (4) and 42 of the E.C.S.C. Treaty.

⁸ *Associazione Industrie Siderurgiche Italiane (ASSIDER) c. Haute Autorité*, *Recueil*, 1 (1954-5), p. 148.

⁹ *Friedrich Stork et Cie c. Haute Autorité*, *Recueil*, 5 (1958-9), p. 63.

¹⁰ *Firme I. Nold KG c. Haute Autorité*, *ibid.*, p. 160.

¹¹ *Ibid.*, p. 132: 'Il est donc possible de dire que la procédure de la Communauté renvoie au droit national pour savoir à quelles conditions personnelles les avocats peuvent faire valablement des actes de procédure.' *Ibid.*, p. 133: 'C'est là une question de capacité juridique et, en l'absence de dispositions particulières du droit de la Communauté, il faut l'apprécier selon les règles du droit national, donc du droit allemand, puisqu'il s'agit d'une société allemande. Les

A few examples may now be given of the manner in which the Court extracts, refines and applies those legal principles common to some of the European countries, as the Community law. The best example is that of *détournement de pouvoir*, concerning which, as the Advocate-General says,

‘... l’appel aux droits nationaux nous paraît s’imposer. La notion de détournement de pouvoir n’a évidemment pas été inventée par les auteurs du Traité et, pour essayer de se former une opinion sur ce que doit être le détournement de pouvoir dans l’application du Traité... il faut d’abord savoir ce qui en est dans le droit respectif de nos six pays.’¹

Twenty-six pages later the Advocate-General comes to the end of his brief incursion into domestic law! Other examples of this process of comparative law are to be found concerning ‘le principe de l’égalité’,² ‘l’exception d’illégalité’,³ contracts of employment,⁴ the revocability of certain administrative acts,⁵ a comparison of the powers of verification under Article 47 of the European Coal and Steel Community Treaty⁶ and the posting rules concerning letters.⁷

The application, by analogy, of rules of municipal law to international law is by no means a new phenomenon.⁸ However, it has now achieved a new intensity and dimension in the jurisprudence of the Court of the European Communities.

✓(c) *Teleological interpretation*

According to the teleological principle, a treaty must be interpreted by reference to its objects, principles and purposes: in this way, gaps can be filled and texts expanded or supplemented, so long as this is consistent with the objects and purposes in question.⁹ Such a principle of interpretation is particularly well suited to the needs of an international organization. In this respect it has frequently been invoked by the International Court of

dispositions du code de commerce allemand, de la jurisprudence et de la doctrine allemandes permettent de faire les constatations suivantes...’.

¹ *Associazione Industrie Siderurgiche Italiane (ASSIDER) c. Haute Autorité*, *Recueil*, 1 (1954-5), p. 172.

² *Chambre syndicale de la sidérurgie française c. Haute Autorité*, *Recueil*, 4 (1958), p. 386.

³ *Meroni et Cie, Industrie Metallurgiche Società Accomandita Semplice c. Haute Autorité*, *ibid.*, p. 101.

⁴ *Miranda Mirossevich c. Haute Autorité*, *Recueil*, 2 (1955-6), p. 415.

⁵ *Dineke Algera, M. Giacomo Cicconardi, Mme Simone Couturaud, M. Ignazio Genuardi, Mme Félicie Steicher c. Haute Autorité*, *Recueil*, 3 (1956-7), p. 115.

⁶ *Acciaieria e Tubificio di Brescia c. Haute Autorité*, *Recueil*, 6/1 (1960), pp. 192-4.

⁷ *Società Industriale Metallurgica di Napoli (SIMET), Meroni et Cie, Industrie Metallurgiche a Erba, Meroni et Cie, Industrie Metallurgiche a Milan, Fer. Ro. (Ferriere Rossi) et Acciaieria San Michele c. Haute Autorité*, *Recueil*, 5 (1958-9), p. 343: ‘... les recours introductifs d’instance ont été postés le 19, ce qui est suffisant, car, selon le droit des six États membres, l’acte est réputé notifié par la simple remise à la poste.’

⁸ Lauterpacht, *Private Law Sources and Analogies of International Law* (1927).

⁹ Fitzmaurice, ‘Law and Procedure of the International Court of Justice’, this *Year Book*, 28 (1951), p. 8.

Justice¹ and that Court, in its recent Judgment interpreting the constitution of the International Maritime Consultative Organization, expressly stated that:

'The interpretation the court gives to Article 28 (a) is consistent with the general purpose of the Convention. . . . The Court cannot subscribe to an interpretation of "largest-ship-owning nations" in Article 28 (a) which is out of harmony with the purposes of the Convention.'²

Articles 1-8 of the European Economic Community Treaty and Articles 2-5 of the European Coal and Steel Community Treaty contain the general objectives and purpose of the Treaty. Theoretically, it would be possible for the Court to place great emphasis on these general objectives and to attempt to justify any extensive and dynamic interpretation of the Treaty by reference to them.

In practice the Court has certainly recognized their importance:

'Les articles 2, 3 et 4 du Traité, mentionnés en tête du paragraphe 1 de l'article 60, constituent des dispositions fondamentales établissant le marché commun et les objectifs communs de la Communauté. Leur importance résulte clairement de l'article 95. En autorisant la Haute Autorité à définir les pratiques interdites, le Traité l'oblige à tenir compte de tous les buts prescrits par les articles 2, 3 et 4.'³

The reference here to Article 95 serves to confirm the importance of the fundamental provisions, for Article 95, although it allows for an amendment of the rules proposed by the High Authority and the Council, stipulates that such amendments may only be made 'provided that they do not modify the provisions of Articles 2, 3 and 4'. This special emphasis on the general provisions of the Treaty has led some writers to conclude that such provisions may well occupy a special juridical position in the Treaty. However, the better view would seem to be that all the articles in the Treaty possess an equal juridical value.⁴

In one of the early cases decided by the Court, there is a most forceful statement by the Advocate-General in a passage which has already been cited but bears repeating to the effect that, when interpreting the Treaty, the Court must pay particular attention to its general objectives:

'Il en résulte que, dans l'application et dans l'interprétation du Traité, il serait dangereux de ne s'en tenir qu'à la lettre de son texte. Pour découvrir les objectifs économiques assignés à telle ou telle disposition particulière, il faut se reporter aux objectifs et aux principes fondamentaux du Traité. Tout récemment, dans ses premiers

¹ See Advisory Opinion concerning the *International Status of South-West Africa*, I.C.J. Reports, 1950, p. 128; *Reparation for Injuries suffered in the Service of the United Nations*, I.C.J. Reports, 1949, p. 185.

² *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, I.C.J. Reports, 1960, pp. 170-1.

³ *Gouvernement de la république française c. Haute Autorité*, Recueil, 1 (1954-5), p. 23.

⁴ Reuter, 'Le Droit de la Communauté européenne du charbon et de l'acier', *Journal du droit international*, 80 (1953), p. 18.

arrêts, la Cour a relevé tout spécialement la portée de ces objectifs généraux et mon éminent collègue Lagrange a insisté dans ses conclusions sur le fait que, dans l'exercice de ses pouvoirs, la Haute Autorité ne doit perdre de vue aucun des objectifs du Traité et que, pour atteindre le but visé par une disposition particulière, elle doit éviter de sacrifier un objectif général plus important; il a fait observer que les mêmes principes doivent guider la Cour dans l'interprétation du Traité.¹

Several questions arise from a consideration of the general provisions of any of the three Treaties. May one refer to such provisions when they are not expressly mentioned in one of the specific provisions? What happens if there is a conflict between the specific provisions of the Treaty and the general provisions, or between the general provisions themselves?² The answer to these questions is that the Court has tended to interpret specific provisions in the light of the purpose of the whole Treaty and so avoid an approach which would be too literal and confined.

'Lorsque la Haute Autorité est appelée à exercer un pouvoir tel que celui qui lui est conféré par l'article 60, paragraphe 2, de fixer les conditions de publicité des barèmes, elle ne doit perdre de vue aucun des objectifs du Traité et, pour atteindre celui ou ceux qui sont plus spécialement visés par la disposition à appliquer, éviter d'en sacrifier d'autres peut-être plus importants.'³

An equally well-balanced and integrated approach is illustrated by the Court's statement that all the general objects and principles of the Treaty

'... doivent être considérés dans leur ensemble et simultanément appliqués; ... ces objectifs étant des principes généraux, vers la réalisation et l'harmonisation desquels il faut tendre dans toute la mesure du possible.'⁴

The Court recognized that facts and economic circumstances may sometimes necessitate the emphasis of one particular general article and consequent lack of attention to the others.⁵ Such general articles may also be invoked, even if not expressly referred to in a specific provision.⁶

In the early cases decided by the Court, the general articles and purpose of the Coal and Steel Community Treaty were frequently mentioned.⁷ In more recent years, however, less express reference is made to them,⁸ and one may note at least one of the early judgments of the Court upholding a literal interpretation of a specific provision, even though this was manifestly in conflict with the clear guiding principle enunciated in Article 4.⁹

¹ *Gouvernement du royaume des Pays-Bas c. Haute Autorité*, *Recueil*, 1 (1954-5), p. 232.

² *Bebr*, loc. cit., pp. 861-7.

³ *Gouvernement de la république française c. Haute Autorité*, *Recueil*, *ibid.*, pp. 53-55.

⁴ *Groupement des hautes fourneaux et aciéries belges c. Haute Autorité*, *Recueil*, 4 (1958), p. 242. See also *ibid.*, pp. 384, 419, 456, 493, 513.

⁵ *Chambre syndicale de la sidérurgie française c. Haute Autorité*, *ibid.*, p. 279.

⁶ See *ibid.*, pp. 383, 417, 454, 491.

⁷ See *ibid.* Many cases in this particular volume refer to the application of the general articles.

⁸ However, as the Court will seldom admit, by name, that it is following a particular principle of interpretation, it may frequently reach a particular finding by means of a teleological approach without expressly acknowledging it.

⁹ *Groupement des industries sidérurgiques luxembourgeoises c. Haute Autorité*, *Recueil*, 2 (1955-6), pp. 53 et seq.

As the purpose of a treaty is usually closely interwoven from one provision to another, especially in the Community treaties,¹ a teleological interpretation of such provisions is both necessary and desirable.

(d) *Implied powers*

Apart from the express powers conferred on it by its constitutive instrument, it is inevitable that any international organization will require a certain measure of implied powers in order to discharge its functions effectively. Such has been the experience of the International Labour Organization,² the International Monetary Fund,³ the United Nations and the European Coal and Steel Community. One may refer in this connexion to the well-known statement by the Court in the *Reparation for Injuries* case:

'... under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter are conferred upon it by necessary implication as being essential to the performance of its duties.'⁴

The same view was again expressed by the Court concerning the power of the United Nations to establish a tribunal to decide disputes between the Organization and its staff. As the establishment of such tribunal

'... was essential to ensure the efficient working of the Secretariat and to give effect to the paramount consideration of receiving the highest standards of efficiency, competence and integrity . . . capacity to do this [i.e., to set up the tribunal] arises by necessary intendment out of the Charter.'⁵

Such a rigorous application by the Court of the principle of effectiveness must almost bring the above statements within the category of judicial legislation. In this respect it is pertinent to note the more cautious remark of Judge Hackworth in his Dissenting Opinion that,

'Powers not expressed cannot freely be implied. Implied powers flow from a grant of expressed powers and are limited to those that are necessary to the exercise of powers expressly granted.'⁶

¹ See Congrès international d'études sur la Communauté Européenne du charbon et de l'acier, *Actes officiels*, 2 (1957), pp. 218-19.

² See *International Labour Organization and the Conditions of Agricultural Labour*, P.C.I.J., 1922, Series B, No. 2, p. 215; *International Labour Organization and the Personal Work of the Employer*, P.C.I.J., 1926, Series B, No. 13, p. 18: 'It results from the consideration of the provisions of the Treaty that the High Contracting Parties clearly intended to give to the International Labour Organization a very broad power of co-operating with them in respect of measures to be taken in order to assess humane conditions of labour and the protection of workers. It is not conceivable that they intended to prevent the organization from drawing up and proposing measures essential to the accomplishment of that end.'

³ See Fawcett, 'The Place of Law in an International Organization', this *Year Book*, 36 (1960), p. 333.

⁴ *Reparation for Injuries suffered in the Service of the United Nations*, I.C.J. Reports, 1949, p. 182.

⁵ *Effects of Awards of Compensation made by the United Nations Administrative Tribunal*, I.C.J. Reports, 1954, p. 57.

⁶ *Reparation for Injuries, &c.*, I.C.J. Reports, 1949, p. 198.

As the Court of the European Communities has also had occasion to give a decision on this point, its jurisprudence on this matter will be of some interest.

The case concerned a dispute between the *Fédération charbonnière de Belgique* against the High Authority involving the interpretation of section 26 of the Convention containing the transitional provisions. These provisions were designed to regulate the gradual integration of the coal and steel of the six countries, and section 26, in particular, to assist the Belgian coal industry, since its costs of production compared unfavourably with those of the other countries. A detailed system of compensation was therefore adopted to facilitate the integration of Belgian coal, to harmonize prices in the Common Market generally and to reduce Belgian prices to a level near that of the estimated costs of production at the end of the transition period. However, as section 26 gave no precise indication as to who was to be responsible for operating the 'rapprochement des prix', a dispute arose.

The Belgian Coal Federation alleged that the Treaty had envisaged a kind of market in which the enterprises would be free to fix the prices '... sauf dérogation expresse, ce sont donc, en l'espèce, les entreprises elles-mêmes qui fixent les prix...';¹ and that any intervention by the High Authority in this matter must be limited '... à des cas expressément prévus au Traité, notamment à l'article 61 de celui-ci'.² However, the Court found itself unable to accept this submission and stated that such an interpretation would defeat the whole object of the convention.³ On the same ground it rejected the argument that the High Authority must be confined to the powers already granted to it to fix prices under Article 61 of the Treaty.⁴ The Federation, tenacious as ever, then argued that the High Authority could still achieve the purpose of the Transitional Convention by indirect means. It could do this by taking sanctions against the enterprises which had failed to observe the obligation to lower their prices in accordance with the Convention. However, this argument also found no favour with the Court.⁵

One may notice the determination of the Court to reject any interpretation which would not fulfil the object of the Convention. This is confirmed by the interpretation which the Court finally accepted:

'Dans ces conditions, il faut constater que seule l'intervention directe de la Haute Autorité est de nature à garantir la réalisation immédiate de l'abaissement des prix qui doit obligatoirement accompagner la péréquation.'⁶

¹ *Fédération charbonnière de Belgique c. Haute Autorité*, *Recueil*, 2 (1955-6), p. 302.

² *Ibid.*

³ *Ibid.*, at p. 303: 'Si les prix du charbon belge étaient livrés au jeu de l'offre et de la demande sur le marché, leur abaissement ne serait pas assuré.'

⁴ *Ibid.*, at p. 303.

⁵ *Ibid.*, at p. 304.

⁶ *Ibid.*

It follows from this, that if the object of the Convention is to be implemented and this can only be achieved by the direct intervention of the High Authority, yet there is no express power permitting this direct intervention, then it must of necessity be implied.¹ The Court then invokes the principles of municipal law and international law to justify such an interpretation:

‘De l’avis de la Cour, il est permis, sans se livrer à une interprétation extensive, d’appliquer une règle d’interprétation généralement admise tant en droit international qu’en droit national et selon laquelle les normes établies par un traité international ou par une loi impliquent les normes sans lesquelles les premières n’auraient pas de sens ou ne permettraient pas une application raisonnable et utile. En outre, la Haute Autorité est chargée aux termes de l’article 8 du Traité d’assurer la réalisation des objectifs fixés par le Traité dans les conditions prévues par celui-ci. Il faut conclure de cette disposition, principe directeur des attributions de la Haute Autorité définies au Chapitre I du Traité, qu’elle jouit d’une certaine autonomie en vue de déterminer les mesures d’exécution qu’appelle la réalisation des objectifs visés au Traité ou à la Convention qui en fait partie intégrante. Comme il s’agit en l’espèce de réaliser l’objectif du paragraphe 26 de la Convention, la Haute Autorité a le pouvoir, sinon l’obligation, de prendre . . . dans les limites tracées par cette disposition . . . les mesures susceptibles d’assurer l’abaissement des prix du charbon belge.’²

It will be noticed that the Court here is formulating a limited³ and severely circumscribed doctrine of implied powers. There is no attempt to impute a new power to the Organization. Powers will only be implied to implement a power already expressed in the Treaty and then only to achieve the limited purpose of that express power and to permit it a reasonable and useful application. In two recent cases the Court has again referred to the above views⁴ and it is submitted that the attitude of the Court is to be welcomed. Subject to and within the above limitations, the doctrine of implied power will always be necessary for the effective functioning of any international organization.

¹ *Fédération charbonnière de Belgique c. Haute Autorité*, *Recueil*, 2 (1955-6), at pp. 304-5: ‘La requérante a soutenu, au cours de la procédure orale, que l’absence dans le Traité d’une attribution expresse du pouvoir de fixer d’autorité les prix s’oppose à la reconnaissance d’un tel pouvoir au moyen d’une interprétation qu’elle estime extensive et inadmissible en droit. La Cour n’est pas de cet avis en tant qu’il s’agit dans l’espèce d’un pouvoir sans lequel, comme elle vient de le constater, la péréquation ne peut fonctionner au vœu du paragraphe 26 de la Convention, c’est-à-dire sur la base d’un abaissement des prix immédiat et assuré.’

² *Ibid.*, at p. 305.

³ *Ibid.*: ‘Il en résulte que l’accomplissement de sa mission postule, dans l’espèce, pour la Haute Autorité le pouvoir de fixer les prix. Il faut reconnaître, cependant, que l’étendue de ce pouvoir est limitée au seul objectif d’assurer à l’ensemble des consommateurs du charbon belge une baisse de prix de ce charbon, dès le début de la période de transition, et dans la mesure prescrite par la Convention dans son paragraphe 26.’

⁴ *Gouvernement de la république italienne c. Haute Autorité*, *Recueil*, 62 (1960), p. 688: ‘qu’en effet la doctrine et la jurisprudence sont d’accord pour admettre que les règles établies par un traité impliquent les normes sans lesquelles ces règles ne peuvent être appliquées utilement ou raisonnablement’; *Gouvernement du royaume des Pays-Bas c. Haute Autorité*, *ibid.*, p. 757.

(e) Effective and restrictive interpretation

The principle of effective interpretation or *ut magis valeat quam pereat*, has been a consistent feature of the jurisprudence of the International Court of Justice, especially when construing the constituent instrument of an international organization.¹ The principle involves, when a provision is doubtful, giving it an extensive interpretation and one that will be most conducive to the proper functioning of the organization. In other words there is no presumption that the constituent instrument of an international organization involves a derogation from State sovereignty and so must be restrictively² interpreted; rather one presumes that States intended to impart some measure of meaning to the text and that it is the function of the Court to give full effect to this meaning without doing violence to the words used. Sometimes, of course, a restrictive interpretation will be the most effective in that it will be the most efficacious for the organization.

A brief survey will now be made of the approach to this question adopted by the Court of the European Communities, with the preliminary caution that it will inevitably be selective and will only serve as a tentative and limited indication of the Court's attitude.

One thread of continuity is to be found in the manner in which the Court has given extensive interpretation to those provisions concerning the protection of enterprises. In one case an attempt was made to distinguish between coal and steel enterprises in the sense that only coal enterprises affected by an act of the High Authority dealing with some aspect of the coal industry could appeal to the Court. Thus a steel enterprise, even though affected by such an act, would have no right of appeal. However, the Court refused to restrict the appeal of enterprises to the nature of the subject involved in the dispute:³

'considérant, conformément aux conclusions de l'avocat général, qu'aucune disposition du Traité n'exige que la spécialisation des producteurs soit liée à la spécialité du litige; que le silence du Traité, sur ce point, ne saurait être interprété au détriment des entreprises et associations.'⁴

¹ See *International Labour Organization and the Conditions of Agricultural Labour*, P.C.I.J., 1922, Series B, No. 2, p. 215; *Reparation for Injuries Suffered in the Service of the United Nations*, I.C.J. Reports, 1949, p. 179; Lauterpacht, *The Development of International Law by the International Court of Justice* (1958), pp. 267-81.

² *Lotus case*, Series A, No. 10, p. 8: 'International Law governs relations between independent states. The rules of law binding upon States therefore emanate from their own free will. . . . Restrictions upon the sovereignty of States cannot be presumed.' However, see Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties', this *Year Book*, 26 (1949), p. 84: 'In so far as there is a case—and there is some case—for eliminating unnecessary and cumbersome rules of interpretation, that relating to restrictive interpretation of treaty obligations ought to be considered as first on the list of priorities.'

³ Bebr, loc. cit., pp. 867-75.

⁴ *Groupement des industries sidérurgiques* . . . c. *Haute Autorité*, *Recueil*, 2 (1955-6), p. 86.

In another case¹ the Court had to determine whether an enterprise engaged in making iron castings was an enterprise within the terms of the Treaty. Although it was agreed that iron castings fell outside the definition of 'steel' contained in the annex to the Treaty, yet the annex did mention 'raw pig-iron' and the plaintiff used liquid pig-iron in the manufacture of the iron castings. The Court had to decide, therefore, whether the plaintiffs' liquid pig-iron fell within the term 'raw pig-iron' and whether the plaintiffs, in making liquid pig-iron as the initial step in the production of iron castings, could be held to be 'engaged in an activity of production' of pig-iron within the meaning of the Treaty. The Court answered both questions in the affirmative.

In an equally extensive approach, the Court has interpreted the meaning of a decision of the High Authority. It considered that a letter of the High Authority addressed to the Belgian Government and officially published² was an individual act subject to appeal. A welcome lack of formalism on the part of the Court was again apparent in the statement that,

'cette thèse doit être rejetée, en effet une décision individuelle camouflée reste une décision individuelle, le caractère d'une décision ne dépendant pas de sa forme mais de sa portée.'³

Concerning decisions of the High Authority, one may also note that the Court willingly extended the right granted to enterprises to appeal against decisions of the High Authority, to enable enterprises to appeal against decisions of one of the administrative bodies established by the High Authority to run a subsidy fund.⁴

Finally, a good illustration of the effective approach of the Court and its readiness to provide legal rights of appeal against executive action is its judgment allowing enterprises to appeal against a general decision under which an individual decision has been passed. Such an appeal, even against the general decision, may be brought on all the four grounds set out in Article 33, paragraph 1; and this in spite of the fact that the article only expressly grants a right to enterprises to challenge general decisions on the ground of their being vitiated by a *détournement de pouvoir* having effects with regard to them.⁵

One may now turn to a consideration of those cases where the Court

¹ *Société des fonderies de Pont-à-Mousson c. Haute Autorité*, Recueil, 5 (1958-9), p. 445.

² *Fédération charbonnière de Belgique c. Haute Autorité*, Recueil, 2 (1955-6), p. 224.

³ *Ibid.*, at p. 226. See Bebr, loc. cit., p. 870.

⁴ *Société nouvelle des usines de Pontlieue—Aciéries du Temple (S.N.U.P.A.T.) c. Haute Autorité*, Recueil, 5 (1958-9), p. 298: '... attendu que, dès lors, sous peine de priver les entreprises de la protection dont l'article 33 du traité C.E.C.A. leur a reconnu le bénéfice, il faut admettre que les décisions prises par la C.P.F.I. en vertu de l'article 12, paragraphe 2, de la décision 2-57 valent décision de la Haute Autorité et sont, de ce fait, susceptible de recours en annulation dans les conditions prévues par l'article 33.'

⁵ *Meroni et Cie, Industrie Metallurgiche, S.P.A. c. Haute Autorité*, Recueil, 4 (1958), p. 9.

has adopted a more restrictive approach. The powers embodied in the Treaty are already extensive and it is understandable that on occasions the Court is cautious not to extend these powers too far. Such judicial caution is not necessarily inimical to fulfilling the object of the Treaty; too expansive and vigorous an interpretation may sometimes do more harm than good. Nor is it the function of the Court to attempt to revise the Treaty.¹

Such a restrictive approach was taken by the Court in one of the very first cases it decided.² The point involved an interpretation of Article 60, paragraph 2, which stated that:

‘price-lists and conditions of sale applied by enterprises within the common market shall be published to the extent and in the form prescribed by the High Authority. . . .’

The Court held that such price-lists must indicate the exact prices and that the High Authority, under its power to determine the ‘extent’ and ‘form’ of the obligation, could not authorize the steel producers to deviate up to 2.5 per cent. upward or downward from their published prices. The High Authority had only attempted to make some provision for the inevitable fluctuation of prices. However, the Court was adamant that the Treaty would allow for no such flexibility, no matter how desirable such flexibility might be.

‘La Cour doit s’abstenir de se prononcer sur l’opportunité de ce régime; elle ne peut constater qu’il a été consacré par le Traité qui . . . à tort ou à raison . . . ne contient pas de texte permettant une certaine souplesse des barèmes en cas d’oscillations mineures ou passagères.’³

A rather interesting case concerned the attempt by the High Authority to delegate certain of its powers to the Caisse, an organization in Brussels which had been set up by the High Authority to run a system of subsidies.⁴ It was held in the circumstances that such a delegation was not possible and constituted a violation of the Treaty. However, the Court did envisage that an express delegation of power might be possible provided that it did not upset the carefully balanced institutional structure of the Treaty and that the High Authority would still exercise effective control over the powers delegated.⁵

Two more decisions may be noted. The first⁶ related to the power of the High Authority under Article 70, paragraph 3. This power, to require Governments to publish or to bring to the knowledge of the High Authority

¹ See *Gouvernement de la république italienne c. Haute Autorité*, *Recueil*, 1 (1954-5): ‘Il n’appartient pas à la Cour de s’exprimer sur l’opportunité du système imposé par le Traité ni de suggérer une révision du Traité, mais elle est tenue, selon l’article 31, d’assurer le respect du droit dans l’interprétation et l’application du Traité tel qu’il est établi.’

² *Ibid.*, p. 96.

³ *Ibid.*, p. 97.

⁴ *Meroni et Cie, Industrie Metallurgiche, S.P.A. c. Haute Autorité*, *Recueil*, 4 (1958), p. 20.

⁵ *Ibid.*, p. 44: ‘. . . pareilles délégations ne peuvent porter que sur des pouvoirs d’exécution, exactement définis, et entièrement contrôlés, dans l’usage qui en est fait, par la Haute Autorité.’

⁶ *Gouvernement du royaume des Pays-Bas c. Haute Autorité*, *Recueil*, 6/2 (1960), p. 723.

transport rates, prices and tariff provisions, was challenged before the Court by the Government of the Netherlands. The Court, noting that the powers of the Community were greater than those recognized by traditional international law, adopted a restrictive interpretation.¹ After an analysis of Article 70 it concluded that the High Authority had no authority to prescribe the manner in which the obligation incumbent upon the Netherlands Government to publish prices was to be carried out.

Finally, in a case concerning steel manufacturers in Luxembourg,² the Court took a rather restricted view of the general articles of the Coal and Steel Community Treaty and allowed them to be limited by one of the specific articles. The plaintiffs requested the Court to hold that a special duty placed on coal by the Luxembourg Government constituted a violation of Articles 4 (b) and 4 (c) of the Treaty. However, after a discussion of Article 67 of the Treaty, the Court held that the clear terms of Article 4 of the Treaty abolishing tax-barriers, subsidies and restrictive practices did not constitute the overriding principles of the Community, but rather that they were principles which were circumscribed by the provisions in later articles.

This brief survey of a few cases concerned with an effective or restrictive approach on the part of the Court illustrates that although the Court may occasionally err on the side of timidity, on the whole its approach will be conducive to an effective functioning of the organization.

(f) *Other principles of interpretation*

(i) *Comparison of the three European Community Treaties.* In its more recent jurisprudence, the Court, after interpreting a provision, will sometimes add, 'que ce raisonnement est confirmé par les traités instituant la C.E.E. et la C.E.C.A.'.³ A precedent for this particular principle of interpretation is to be found in the Advisory Opinion of the Permanent Court of International Justice concerning the employment of women during the night.⁴

¹ Ibid., p. 761: 'Attendu que l'article 88 ouvre des voies d'exécution et constitue l'ultima ratio permettant de faire prévaloir les intérêts communautaires consacrés par le traité contre l'inertie et contre la résistance des États membres, qu'il s'agit là d'une procédure dépassant de loin les règles jusqu'à présent admises en droit international classique pour assurer l'exécution des obligations des États . . . , pourtant, l'article 88 est de stricte interprétation.'

² *Groupeement des industries sidérurgiques luxembourgeoises c. Haute Autorité*, Recueil, 2 (1955-6), p. 77.

³ *Jean-E. Humblet c. État belge*, Recueil, 6 (1960), pp. 1154, 1156; *De Gezamenlijke Steenkolenmijnen in Limburg c. Haute Autorité*, Recueil, 7 (1961), pp. 13, 24, 28, 31: 'L'article 92 du traité instituant la Communauté économique européenne confirme cette interprétation de l'article 4 (c) du Traité instituant la Communauté européenne du charbon et de l'acier.'

⁴ *Interpretation of the Convention of 1919 concerning the Employment of Women during the Night*, P.C.I.J., 1932, Series A. 13, No. 50, p. 381: 'If in the Eight Hour Day Convention, after a prohibition applicable to "persons", it was necessary to make an exception in respect of persons holding positions of supervision or management, it was equally necessary to make a corresponding exception in respect of women in the Convention on night work of women, if it was intended that women holding positions of supervision or management should be excluded from the operation of the Convention.'

This principle of interpretation will normally only be used to sustain a conclusion already reached by other means. It is most frequently invoked by the parties themselves,¹ and the Advocate-General in his conclusions emphasizes its limited value.² Although this approach to interpreting the Community treaties may become more frequent in the future, it will never be decisive.

(ii) *A contrario*. It is sometimes argued that the express reference to a principle in one provision will exclude the application of such a principle whenever it is not expressly mentioned.³ However, the Court has clearly stated that such an approach to interpretation is only to be used as a last resort:

‘... l’on ne saurait trouver dans la mention expresse figurant à l’article 36 un argument excluant *a contrario* l’application de la règle énoncée dans les cas où elle n’a pas été expressément mentionnée, la Cour ayant décidé, dans son arrêt no. 8/55, qu’une argumentation *a contrario* n’est admissible que lorsqu’aucune autre interprétation ne s’avère adéquate et compatible avec le texte, le contexte et leur finalité.’⁴

(iii) *Subsequent practice and interpretation*. It is a reasonable principle of interpretation to observe how a party in practice has interpreted and applied a particular provision. Such a principle is recognized by the International Court of Justice⁵ and was applied by the Court of the European Communities in one of its earliest cases:

‘C’est du reste dans ce sens que la Haute Autorité, aussi bien dans ses décisions antérieures que dans la décision 2-54, semble avoir toujours interprété le Traité...’⁶

Although this is the only example of its application, it would seem to be a more reliable guide towards ascertaining the meaning of a provision than many of the other principles.

(iv) *Interpretation by reference to the context*. Words must be given their ordinary⁷ plain, reasonable meaning.⁸ If, however, their meaning still remains unclear, the Court will place them in their context:

‘On a dit, il est vrai, à juste titre, qu’une simple interprétation littérale ne peut rien apporter de décisif sur le critère de charge spéciale. Il faut donc placer cette interdiction

¹ *Società Industriale Metallurgica di Napoli (SIMET), Meroni et Cie, Industrie Metallurgiche à Erba, Meroni et Cie, Industrie Metallurgiche à Milan, Fer. Ro. (Ferrière Rossi) et Acciaierie San Michele c. Haute Autorité, Recueil*, 5 (1958-9), pp. 345-6: ‘Les récents traités instituant la Communauté Économique Européenne et l’Euratom devraient suggérer à la Cour d’interpréter libéralement la protection juridictionnelle des entreprises de la C.E.C.A. . . .’

² *Alberto Campolongo c. Haute Autorité, Recueil*, 6/2 (1960), pp. 845-9: ‘Si, actuellement, il n’est certes pas possible de parler d’une unité juridique des trois Communautés européennes, on ne peut cependant écarter la constatation que les liens juridiques des trois Communautés qui existent déjà et leur unité spirituelle constituent une réalité qui appelle une unification juridique plus poussée.’

³ *Firme I. Nold K.G. c. Haute Autorité, Recueil*, 5 (1958-9), p. 160.

⁴ *Meroni et Cie, Industrie Metallurgiche S.P.A. c. Haute Autorité, Recueil*, 4 (1958), pp. 26-27.

⁵ *International Labour Organization and the Conditions of Agricultural Labour, P.C.I.J.*, 1922, Series B, No. 2, pp. 39-40.

⁶ *Gouvernement de la république italienne c. Haute Autorité, Recueil*, 1 (1954-5), p. 26.

⁷ *Bochumer Verein für Gusstahlfabrikation AG., Niederrheinische Hütte AG. et Stahlwerke Südwestfalen AG. c. Haute Autorité, Recueil*, 5 (1958-9), p. 241.

⁸ *Firme I. Nold K.G. c. Haute Autorité, ibid.*, p. 131.

dans le cadre d'ensemble de l'article 4 et se demander quel est son sens et quel est son but.¹

If its meaning is still obscure then the Court will sometimes refer to other parts of the Treaty:

'La lecture du texte de l'article 70, alinéa 1, donne lieu à des doutes. Une comparaison avec d'autres passages du Traité et l'examen du système du Traité dans son ensemble . . . doivent contribuer à éclaircir cette question.'²

Such a method of interpretation is unexceptional and calls for no comment.

Conclusion

Bearing in mind the jurisprudence of the Court of the European Communities and that of the International Court of Justice relating to the interpretation of the constitutive instrument of an international organization, some general conclusions may be tentatively advanced.

Lord McNair has urged that we should

'free ourselves from the traditional notion that the instrument known as the Treaty is governed by a single set of rules, however inadequate, and set ourselves to study the greatly differing legal character of the several kinds of treaties and to frame rules appropriate to the character of each kind'.³

The charter of an international organization creates something organic and permanent and would seem to demand recognition as falling into a special category of treaty.⁴ In a sense such treaties are analogous to documents embodying a written constitution such as that of the United States.⁵

'One must remember this is a constitution we are interpreting!' This type of statement may be frequently found in judgments of the Supreme Court when interpreting the constitution. The reason 'one must remember' is given by Chief Justice Marshall in *McCulloch v. Maryland*,⁶ when he says that a constitution should never 'partake of the prolixity of a legal code', and by Chief Justice Hughes's pronouncement in the famous *Mortgage Moratorium* case in 1934:

'It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation, which the framers, with the conditions and outlook of their time would have placed upon them, the statement carries its own refutation.'⁷

¹ *Groupeement des industries sidérurgiques . . . c. Haute Autorité, Recueil*, 2 (1955-6), p. 137.

² *Compagnie des hauts fourneaux . . . de Givors . . . c. Haute Autorité, Recueil*, 6/1 (1960), p. 551.

³ McNair, 'The Functions and Differing Legal Character of Treaties', this *Year Book*, 11 (1930), p. 118.

⁴ de Visscher, 'L'Interprétation judiciaire des traités d'Organisation Internationale', *Rivista di Diritto Internazionale*, 41 (1958), p. 177.

⁵ See Jenks, 'Some Constitutional Problems of International Organizations', this *Year Book*, 22 (1945), p. 16,

⁶ 4 Wheat. 316 (1819), p. 413.

⁷ *Ibid.*, p. 413.

Similarly, the basic instrument of an international organization calls 'into life a being the development of which could not have been foreseen completely by the most gifted of its begetters'.¹ Flexibility and adaptability will be its essential desiderata to enable it to respond to a future full of uncertainty and change. Such a treaty is not to be construed as a contract² or statute in municipal law and incantations concerning State sovereignty and restrictive interpretation³ will be totally unrealistic. Equally unreal will be any reference to the intentions of the parties. Such intentions, always difficult to discover, become even more elusive in the case of a multilateral treaty establishing a permanent state of affairs.⁴ Indeed, in the case of the United Nations Charter, less than half the present Members even participated in drafting the constitutive instrument. It is useful to note in this respect that with the advent of the multipartite instrument, less attention is being paid to the contractual aspects⁵ and more attention given to the legislative element involved.

The teleological⁶ and effective principles of interpretation suggest themselves as being best suited to the needs of an international organization.⁷ In this respect one may note a variation or extension of the teleological principle called the 'emergent purpose' principle.⁸ This is an extreme and dynamic form of the teleological approach according to which the object or purpose of the treaty is itself not a fixed or static one, but is liable to change or develop as experience is gained in the operation and working of the convention. The intentions of the framers of a constitutive treaty are exhausted once they have given it birth; it then acquires a new dimension of its own.

This special case of constitutive treaties and their need for a dynamic and flexible interpretation raises the whole question of the nature and limits of the judicial function. The judges are not legislators, even though their activity may well involve a quasi-legislative element; nor is it their function

¹ *Missouri v. Holland* 252, U.S. 416 (1920).

² McNair, loc. cit., p. 106: 'I suggest that it is significant that the seed-bed of the traditional rules as to the formation, validity, interpretation and discharge of treaties which swell the bulk of our text-books, too often written in slavish imitation of their predecessors, was sown at a time when the old conception of a treaty as a contract, a bargain, a vertrag, was exclusively predominant and the dawn of the new multilateral treaty had not begun.'

³ See Koplemas, *L'Organisation des Nations Unies* (1947), pp. 252-311 at p. 295.

⁴ See *Annuaire de l'Institut de Droit International* (1952), 2nd part, pp. 366, 391.

⁵ Jenks, 'State Succession in Respect of Law-making Treaties', this *Year Book*, 29 (1952), p. 105: 'Just as treaty provisions creating local obligations are to be regarded as having the character of executed conveyances rather than that of contractual provisions which continue to be executory, so obligations under legislative instruments should be regarded as obligations under the law rather than as contractual obligations'; *International Status of South-West Africa, I.C.J. Reports*, 1950, p. 128.

⁶ *Competence of the General Assembly for the Admission of a State to the United Nations*, ibid., p. 23: 'The interpretation of the San Francisco instruments will always have to present a teleological character if they are to meet the requirements of world peace, co-operation between men, individual freedom and social progress.'

⁷ Bebr, loc. cit., pp. 855-6.

⁸ Fitzmaurice, 'The Law and Procedure of the I.C.J.', this *Year Book*, 33 (1957), p. 208.

to rewrite or revise a basic treaty. They will be limited to the text and should not seek to impart to it a meaning completely incompatible with the words used. Such an approach would only serve to empty the text of all reasonably ascertainable meaning and to alienate the good will of the member States.

However, the choice facing the Court will rarely be one of full effectiveness or utter frustration; it will usually be a question of a higher or lower degree of effectiveness. It is submitted that, when interpreting a constitutive treaty, a court should adopt as a guiding principle that the bias should be in favour of higher effectiveness.

UNITED NATIONS FORCES SOME LEGAL PROBLEMS*

By FINN SEYERSTED

MAIN HEADINGS: *Introduction. Chapter I—Civilian and Semi-military Forces Individually Enlisted by the United Nations*: 1. United Nations Guard and United Nations Field Service; 2. Military Observers; 3. The Force Clearing the Suez Canal. *Chapter II—Military Forces Composed of National Contingents: Extent of United Nations Control*: 1. Article 16 of the League of Nations Covenant; 2. Military Forces Established by the League of Nations; 3. Articles 42–47 of the Charter; 4. The Force in Korea; 5. The Uniting for Peace Resolution; 6. The United Nations Emergency Force in the Middle East; 7. The United Nations Force in the Congo; 8. A Permanent United Nations Force. *Chapter III—International Representation of and Responsibility for the Force*: 1. General; 2. Operational Control; 3. Treaties; 4. Claims against the Force and its Members; 5. Protection of the Rights of the Force and its Members; 6. Conclusions. *Chapter IV—Competence to Establish Forces without Constitutional Provisions*: 1. Relation of League of Nations Forces to Article 16 of the Covenant; 2. Relation of the United Nations Forces to Articles 42–43 of the Charter; 3. General Inherent Powers of Intergovernmental Organizations; 4. Inherent Power of the United Nations to Establish and Operate Forces; 5. External Status of Forces Established in Violation of Constitutional Provisions.

INTRODUCTION¹

THE Korean and Suez incidents and, still more, the operations in the Congo have brought home to the world, as never previously, both the importance and the diverse implications of international military action. This trend has been further emphasized at the current Disarmament Conference in Geneva, where both the Soviet Union and the United States have included proposals for a United Nations force in their drafts of a

* © Finn Seyersted, 1962.

¹ From recent years the following general literature may be cited: Mezerik, 'The United Nations Emergency Force', *International Review Service*, 3 (1957), No. 33; Scheuner, 'Eine internationale Sicherungsmacht im Dienste der Vereinten Nationen', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 19 (1958), pp. 389–415; Kunzmann, 'Aktuelle Vorschläge für eine Friedenstruppe der Vereinten Nationen', *Europa-Archiv*, 13 (1958), pp. 10811–26, Danish translation in excerpts in *Nordisk Tidsskrift for international Ret*, 29 (1959), pp. 32–48; Schwarzenberger, 'Problems of a United Nations Force', *Current Legal Problems* (1959), pp. 247–68; 'Report of the Committee on the Charter of the United Nations on Problems of a United Nations Force' (with discussion), in the International Law Association's *Report of the Forty-ninth Conference* (Hamburg, 1960), pp. 96–152. For a more complete list, see International Law Association, *Report of the Forty-eighth Conference* (New York, 1958), pp. 627–8.

The article has been brought up to date on events in the Congo as reflected in official records of meetings of the Security Council for 1960, in printed Security Council and General Assembly documents for 1960 (hereafter referred to as *S.C.O.R.* and *G.A.O.R.* respectively), and in mimeographed Security Council documents for 1961.

The writer wishes to acknowledge with thanks valuable material and information supplied by legal officials of the United Nations, including notably Dr. O. Schachter, Mr. W. Cox and Mr. B. Sloan, by the Comité International de la Croix-Rouge, notably by MM. Pictet and Pilloud thereof, by Mr. R. Gorgé, former Legal Adviser of U.N.T.S.O. and U.N.E.F., and by the libraries of the Norwegian Foreign Office and the Norwegian Nobel Institute, as well as Libraries in Geneva and Vienna.

Disarmament Treaty. While the attention of the public has mainly been upon the political and military aspects of the operations undertaken by or in the name of the United Nations, the three incidents referred to have also been the cause of legal developments which are not only of the highest interest to international lawyers but potentially of great significance. Although some aspects of international military operations had been the subject of cursory studies in the League of Nations and in the Military Staff Committee of the United Nations, the legal problems had received comparatively little notice. In consequence, they have had to be solved empirically by those concerned in the operations and more particularly by the Secretariat of the United Nations, which has been responsible for the legal policy in regard to the United Nations forces in the Middle East and in the Congo.

There were, it is true, some previous instances of the use of international forces as, for example, in the Saar plebiscite and the Leticia dispute during the League period, but these experiments were on too minor a scale to furnish much guidance for operations such as those of the United Nations in Korea, the Middle East and the Congo. The practice of the United Nations, on the other hand, is already extensive and makes it possible not only to discern the nature of the legal problems to which international military action may give rise but also many of the principles determining their solution. The purpose of the present paper, therefore, is to survey the practice in regard to international military forces and to analyse some of the general legal problems which such forces throw up and which are not solved by express provisions in the relevant international instruments.

The paper comprises four chapters covering (I) civilian and semi-military forces enlisted individually by the United Nations, (II) military forces composed of national contingents and the extent of the United Nations' control over them, (III) the question of who represents the force internationally and is responsible for its acts, and (IV) the question whether the United Nations can establish forces in circumstances other than those specified in the Charter. A fifth chapter, dealing with the application of the laws of war to international military operations, has to be published separately owing to considerations of space.

CHAPTER I

CIVILIAN AND SEMI-MILITARY FORCES INDIVIDUALLY ENLISTED BY THE UNITED NATIONS

Neither the United Nations nor any other intergovernmental organization is known to have ever established a genuine military force by direct international recruitment. The many important proposals for an inter-

national police force which were made during the period of the League of Nations were never seriously considered by the League;¹ and the proposal of Secretary-General Trygve Lie in 1948 for a United Nations Guard, composed of from 800 to several thousand uniformed, lightly armed men recruited by the Secretary-General as a unit of the Secretariat,² received no support from the Big Powers and had to be abandoned.³ The three different examples of special non-fighting groups recruited by the United Nations which will now be examined do, however, furnish some material for a discussion of the legal position of an individually enlisted international military force.⁴

1. *United Nations Guard and United Nations Field Service*

The first example is the force of uniformed, unarmed United Nations Guards established at an early date for the purpose of maintaining order and security at headquarters (Headquarters Guard Force, Headquarters Security Service). These guards are recruited individually as members of the Secretariat. Again, in 1948 a special force of some fifty United Nations Guards was sent to Palestine to assist the military observers of the truces ordered by the Security Council. These, too, wore United Nations uniforms and were unarmed, and some of them lost their lives owing to military action by the opposing sides.⁵ Then in 1949 the General Assembly, by Resolution 297 (IV), authorized the establishment by the Secretary-General of a United Nations Field Service on the basis of a Secretariat proposal which had been considerably modified as compared to the original proposal for a United Nations Guard Force.⁶ This force of 300 men, recruited individually as part of the Secretariat from among young and physically fit men 'with field experience', wear United Nations uniforms, but carry arms (side-arms) only in special cases. Their functions are entirely civilian and consist of providing technical services for missions (transportation, radio communications, security of members, premises,

¹ See citations in Sohn, *Cases and Materials on World Law* (Brooklyn, 1950), pp. 852-3. Many proposals concerned an international force made up of national contingents; see, for example, the French proposals submitted to the Disarmament Conference 1932 (reproduced *ibid.*, pp. 845-9), under which the League would arrange for the command of the international police force and would be entitled to inspect its component elements.

² A/656, *G.A.O.R.*, 3rd session, Part 2, Annexes, pp. 6 et seq.

³ His proposal of 1952, for a *United Nations Legion*, composed of volunteers but recruited and trained on a national basis, suffered the same fate.

⁴ Some of the facts related in this chapter—and in Chapter II, 2—have been drawn from the publications cited in n. 1 on p. 351.

⁵ The first—and indeed the first United Nations official to give his life—was Ole Helge Bakke, a Norwegian citizen. He was killed on 13 July 1948 by a shot fired by an Arab soldier (see the reports of the Secretary-General contained in documents A/674 [1948] and A/1347 [1949]).

⁶ See the modified proposal of the Secretary-General and the report of the Special Committee on a United Nations Guard in *G.A.O.R.*, 4th session, Suppl. No. 13. Extracts, and the text of the resolution, may be found in *Repertory of Practice of U.N. Organs*, vol. 5, pp. 266-8. The Secretary-General's report is also reproduced in Sohn, *Cases and Materials on World Law*, pp. 853-62.

supplies and archives, maintenance of order during meetings) as well as doing guard duties at headquarters. The eastern bloc countries opposed the creation of the Field Service on the ground that it had 'the character of a military unit'. But the majority of the Special Committee which reported on the Secretariat proposal felt that the Field Service 'could not be considered as an armed force under Article 43 of the Charter, nor could it ever be used for enforcement purposes under Chapter VII'.¹ The Field Service has been employed with a number of United Nations missions in troubled areas, including Palestine, Kashmir and Korea.

2. Military observers

The second example, which concerns a rather different type of force, is the truce observation groups and the other military observation missions which the United Nations has employed in a number of troubled areas,² including Palestine,³ Kashmir⁴ and Lebanon,⁵ and which the League of Nations employed in Vilna in 1920-2.⁶ The members of these groups (except sometimes for their commanders⁷) are not recruited as members of the Secretariat, but are seconded, on an individual and temporary basis, from the armies of Member States. They are normally volunteers, but are sometimes ordered by their national authorities to serve with the United Nations. They wear their own country's uniforms, with distinctive United Nations markings. They usually retain their salaries from their Governments, which are then reimbursed to the Governments by the United Nations. In addition, the United Nations pays directly to the members

¹ G.A.O.R., 3rd session, Part 2, plenary meetings, Annexes, p. 10.

² See in general, Erel, *United Nations Supervision of Provisional Measures for the Cessation of Hostilities* (1956), unpublished thesis, Fletcher School of Law and Diplomacy, Medford, Mass., U.S.A.; and Mohn, 'Problems of Truce Supervision', *International Conciliation* (1952), No. 478.

³ The United Nations Truce Supervision Organization (U.N.T.S.O.) was established by the United Nations Mediator for Palestine under the authority of the Security Council's resolutions of 29 May and 15 July 1949, to observe the truces ordered by the Council. Article X of the Armistice Agreement concluded at Rhodes on 24 February 1949 between Israel and Egypt and the corresponding provisions of the armistice agreements concluded with the other Arab states authorized U.N.T.S.O. to observe the armistices (*U.N. Treaty Series*, vol. 42, pp. 251 et seq.). See Hurewitz, 'The United Nations Conciliation Commission for Palestine', *International Organization*, 7 (1953), pp. 484-97; *International Review Service*, 3 (1957), No. 33, pp. 7-8; and the Reports of the United Nations Mediator.

⁴ The United Nations Military Observer Group in India and Pakistan was established by authority of the Security Council's Resolution of 21 April 1948 (par. 17) and was authorized to station observers where it deemed necessary by the cease-fire line agreement concluded on 27 July 1949 (S/1430, Annex 26). See Lourié: 'The U.N. Military Observer Group in India and Pakistan', *International Organization*, 9 (1955), pp. 19-31.

⁵ The United Nations Observation Group in Lebanon (U.N.O.G.I.L.) was established by the Security Council's Resolution of 11 June 1958 and comprised 592 officers from 21 countries. See the reports of the Group in *S.C.O.R.*, 1958, pp. 3, 33, 34, 79, 127 and 156. For a general account, see the article by its Commander, Odd Bull, 'De Forenede Nasjoners Observatör-gruppe i Libanon i 1958', *Norsk Militært Tidsskrift* (Oslo), Nos. 8-9.

⁶ Walters, *A History of the League of Nations* (Oxford, 1952), vol. 1, pp. 107 and 141-2.

⁷ *International Organization*, 9 (1955), pp. 21 and 24-25.

certain allowances and, furthermore, provides facilities and assumes responsibility for total disability or death. The observers are instructed by and report to the United Nations. They are assisted by regular United Nations staff members (including members of the Field Service) who perform political, legal, administrative, communications and other functions of a civilian character. The functions of the observers are to *observe* military events, and to mediate and persuade when hostile actions or other violations of a truce occur. They do not themselves perform military operations; indeed, they carry arms for self-defence only or not at all. However, they frequently operate in the line of fire, equipped with vehicles or planes, and several of them have lost their lives owing to military action by the opposing sides.¹ The military observation groups are established *ad hoc* in each case, but the General Assembly has established a permanent basis for them in the form of a United Nations Panel of Field Observers.²

3. *The force clearing the Suez Canal*

The third example arose out of the Suez war. Whereas the United Nations Field Service is concerned primarily with internal tasks, and the military observers' task in principle is to observe and report, the blocking of the Suez Canal in 1956 provided an opportunity to establish a temporary civilian force for the performance of an active, external operation although of an entirely civilian nature, that is, the clearance of the Suez Canal. This task was undertaken—on the basis of General Assembly Resolution 1121 (XI) and an exchange of letters of 8 January 1957 between the United Nations and Egypt³—through contractual arrangements concluded by the Secretary-General with private firms. The general plans for the operation were elaborated in consultation with, and approved by, Egypt, and were then implemented under the instructions, direction and control of the Secretary-General and his representative. The men engaged in the operation, being entirely civilian employees of the private firms involved, did not wear uniforms, but enjoyed the status of United Nations personnel *vis-à-vis* Egypt. The ships employed flew the United Nations flag and enjoyed the status of United Nations property. In the exchange of letters between Egypt and the United Nations this was set out as follows:

'The undertaking would be regarded as a United Nations enterprise and its personnel would be under obligation to discharge their functions and regulate their conduct solely in the interests of the United Nations. In keeping with the United Nations

¹ The first victim was a French officer, de Labarrière, who was killed on 6 July 1948 in front of a Jewish barricade in Jerusalem.

² Resolution 297 (IV), the same as established the United Nations Field Service; see above par. 1. Cf. also General Assembly Resolution 377 (V) B/6 (Uniting for Peace).

³ *U.N. Treaty Series*, vol. 257, p. 75. These and other relevant documents are reprinted in E. Lauterpacht, *The Suez Canal Settlement* (London, 1960), pp. 39 et seq.

responsibilities, the vessels would fly the flag of the United Nations in place of their national flags. The property and persons engaged in the clearance operation (including the contractors, subcontractors and their personnel) would, in view of their United Nations character, be covered by the Convention on the Privileges and Immunities of the United Nations to which Egypt is a party, in so far as it may be applicable *mutatis mutandis*.¹

CHAPTER II

MILITARY FORCES COMPOSED OF NATIONAL CONTINGENTS: EXTENT OF UNITED NATIONS CONTROL

In those cases where international organizations have required military forces for external operations—to prevent or repel aggression or to maintain order and security in a disputed or troubled area—such forces have been made up of contingents from national armies, placed at the disposal of the organization by the Governments concerned. Both the Covenant of the League and the Charter of the United Nations contain specific provisions for the creation of an international force of this kind to resist aggression. And both organizations have in fact established military forces by national contingents, although for other purposes and not in the manner prescribed in the constitutions. Only in one case—Korea—has an international force been set up against an aggressor.

It is proposed to summarize in turn the relevant constitutional provisions of the Covenant and the Charter and the facts regarding each force actually set up by the two organizations. Special regard will be paid to the control which the Organization exercises over the force, since this is crucial to the determination of the question who represents the force internationally.¹

1. *Article 16 of the League of Nations Covenant*

Under Article 16 (1) and Article 17 of the Covenant of the League, a Member or non-member State which resorted to war in violation of the provisions of the Covenant should '*ipso facto* be deemed to have committed an act of aggression against all other Members of the League'. These undertook immediately to sever all economic and other intercourse with the State concerned and with its nationals (economic sanctions). The Covenant went on to provide, in Article 16 (2), that 'it shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval or air force the Members of the League

¹ Below, Chapter III. See also Sohn, *American Journal of International Law*, 52 (1958), pp. 235-8.

shall severally contribute to the armed forces to be used to protect the covenants of the League' (military sanctions). The Members also undertook to 'take the necessary steps to afford passage through their territory to the forces of any of the Members of the League which are co-operating to protect the covenants of the League'.

Thus the Covenant, as originally written, appears to have envisaged an *obligation* for all Members to apply economic sanctions and to permit the passage of troops, while there would be no clear obligation for all Members to take part in military sanctions.¹ The provision that an aggressor should, *ipso facto*, be deemed to have committed an act of war against all other Members was interpreted by the second Assembly to mean—not that the unilateral action of the aggressor in itself was enough to bring about a state of war *vis-à-vis* the several Member States or *vis-à-vis* the League itself—but that each Member had a right to declare war and to take military action. Only those who chose to do this would juridically be at war with the aggressor. The League itself was only to declare war as a last resort.²

The system of the Covenant thus appears to have been based upon the concept of an 'old-fashioned' war of coalition, conducted by the several States taking part in the military sanctions,³ although it was conceived that the League also as an entity could declare war.⁴ The Covenant did not provide for any supreme military command of the League, but it did not, on the other hand, preclude the Organization from deciding to establish a unified League command, under whose direction and responsibility the Member States could voluntarily place their troops. Proposals were, indeed, made for pre-planning a force with a central staff, although these were never adopted. It would, however, serve no purpose to speculate further on this point, since the League never proceeded to the length of military action to repel aggression in accordance with Article 16, despite the fact that on several occasions it had to take cognisance of aggression,⁵ and that in one of these cases it went as far as to apply certain economic sanctions.

¹ Cf. Schücking and Wehberg, *Die Satzung des Völkerbundes* (2nd ed., Berlin, 1924), p. 632, and Oppenheim, *International Law*, vol. 2, § 52c.

² Schücking and Wehberg, *op. cit.*, pp. 621–2; cf. pp. 631–2.

³ In this sense Goodrich and Hambro, *Charter of the United Nations* (2nd ed., Boston, 1949), p. 282; Martin and Edwards, *The Changing Charter* (London, 1955), p. 17; Taubenfeld, 'International Armed Forces and the Rules of War', *American Journal of International Law*, 45 (1951), p. 672. The latter concludes that the League approach 'added nothing significant to the pre-existing international law of war and consequently affords no direct precedent for the more integrated United Nations actions'. See also Oppenheim, *op. cit.*, vol. 2, § 292 c, who states that any State contributing military forces 'almost of necessity became a belligerent'.

⁴ Schücking and Wehberg, *loc. cit.*; Oppenheim, *op. cit.*, vol. 1, § 167c; Fauchille, *Traité de droit international public* (Paris, 1922), vol. 1, p. 215. As correctly pointed out by Guggenheim, *Lehrbuch des Völkerrechts* (Basel, 1951), vol. 2, p. 788, the League could not exercise a *jus belli* if it did not have a centralized direction of the enforcement action.

⁵ By Japan against China, by Italy against Ethiopia, by the Soviet Union against Finland.

2. Military forces established by the League of Nations

On the other hand, the League of Nations did on a few occasions employ military forces to maintain order and security in disputed territories, but these forces were not established on the basis of Article 16 or of any other specific provision of the Covenant.

In 1920 a League force was planned for the purpose of occupying and maintaining order in the *Vilna* area during the plebiscite which it had been decided to hold there to determine whether it should become part of Lithuania or Poland. Nine European countries promised contingents (companies). The Force was to be placed under the command of a French officer, assisted by Staff officers. The *extra* costs incurred by the States providing contingents were to be reimbursed by the League, which, in turn, would be reimbursed by the parties to the dispute. But in the end, in view of the opposition of certain States, the Council had to abandon the idea of holding a plebiscite.¹

In 1933-4 a League Commission administered for one year the *Leticia* area on the Upper Amazon, which was in dispute between Colombia and Peru. The Commission kept order by means of a few Colombian troops who were placed under its command. They wore armlets with the letters S.D.N. and were regarded as an international force.²

The first truly international military force was established a few months later, when the Council of the League, by resolutions of 8 and 11 December 1934, established an international force and placed it at the disposal and under the authority of the Governing Commission of the *Saar*, for the purpose of assisting it in maintaining order during the plebiscite in the Saar. The Force, 3,300 strong, was made up of large contingents from the British and Italian armies and smaller detachments from the Netherlands and Swedish armies, which these states had placed at the disposal of the League at its request. The Commander of the Force was designated by the British Government at the request of the Council's Committee on the Saar. Each contingent was independent as regards discipline and internal administration, but general orders were issued in regard to billeting, communications, military transport and furlough. The costs of the Force were borne by the fund for plebiscite expenses and by the Governments of the Saar, France and Germany, and were not included in the budget of the League. The Force, its command and members enjoyed complete immunity from suit in local courts. The Force was to intervene at the request

¹ Council decisions of 21 and 25 November 1920, *League of Nations Official Journal* (January-February 1921), pp. 5-6; Walters, op. cit., vol. 1, pp. 109 and 141.

² *Société des Nations, Journal officiel* (1933), pp. 502 et seq.; Walters, op. cit., vol. 2, pp. 538-40. See also the 'First Report of the Commission for the Administration of the Territory of Leticia, 3 September 1933', *Société des Nations, Journal officiel* (1934), pp. 21-25.

of the Governing Commission of the Saar or, in an emergency, on the initiative of its Commander.¹ However, it was never called upon to use its arms, its mere presence being sufficient to maintain order.²

3. *Articles 42 et seq. of the Charter*³

Article 42 and the immediately following articles of the Charter contain specific provisions concerning military measures against an aggressor if economic and other measures not involving the use of armed force are considered inadequate. In the first place, Article 51 recognizes the inherent right of individual or collective self-defence if an armed attack occurs. This means that the Charter, like Article 16 (1) of the Covenant, recognizes the right of (but establishes no duty for) Member States acting individually to declare war upon the aggressor and to take military action against him 'until the Security Council has taken the measures necessary to maintain international peace and security'. The other articles are concerned with such measures to be taken by the Security Council. Article 42 provides that the Security Council 'may take such action by air, sea or land forces as may be necessary to maintain or restore international peace or security', and adds that such action 'may include' operations by military forces of Member States. It thus leaves the way open for the Security Council to compose its forces either of national contingents contributed by Member States or by other methods, such as individual enlistment.⁴

While the Charter contains no specific provisions on individual enlistment or other methods, it provides, in Articles 43-45, that Member States have a duty to make armed forces available to the Security Council, on its call and in accordance with special agreements to be concluded between the Council and the Member States concerning the 'numbers and types of forces, their degree of readiness and general location' (Article 43). As pointed out by Kelsen, these agreements are not concerned with 'the question as to how the Security Council shall or may use the armed forces placed at its disposal by the member State'.⁵ Indeed, with regard to the organization and operation of the force, it follows from Article 44 that it is the Security Council which makes the 'decisions' concerning the employment of the contingents of armed forces of Member States which these provide in fulfilment of the obligations assumed under Article 43. Article 45 provides that Members shall hold immediately available national air

¹ Ibid., pp. 1705-8, 1729-30, 1762-3 (with text of the main resolution), and 1840-2; cf. the information booklet on *The Saar Plebiscite*, published by the League's Information Section (Geneva, 1935), pp. 18-21.

² Walters, op. cit., vol. 2, pp. 592-3, referring to an unpublished report of October 1935 by the Commander of the Force, Major-General Brind.

³ On the interpretation of these articles, see Goodrich and Hambro, op. cit., and Kelsen, *The Law of the United Nations*, pp. 724 et seq., 744 et seq., and 766 et seq.

⁴ Cf. below, pp. 438-9 and 463-4.

⁵ Op. cit., p. 750; see, however, also pp. 751-2.

force contingents for 'combined international enforcement action', and the Council shall 'determine' the strength and degree of readiness of these contingents and 'plans for their combined action', within the limits laid down in the special agreements. Article 46 provides that the Security Council shall make 'plans for the application of armed force'. Finally, Article 47 provides that the Military Staff Committee—which is composed of the Chiefs of Staff of the permanent members of the Security Council or their representatives—shall assist the Security Council in all these tasks, including 'the employment and command' of forces 'placed at the disposal' of the Council. The Committee shall be responsible, under the Security Council, for the 'strategic direction' of these forces. The question of tactical command was left for subsequent determination, after the Sponsoring Governments had explained at the San Francisco Conference that this could not be exercised by a committee and that it should be left to individuals to be decided upon later.¹ It does not appear from the terms of Article 43 (2) that this and other problems relating to the distribution of powers between the Organization and the several States contributing forces are to be dealt with in the special agreements to be concluded by the Security Council with the members contributing forces. These matters were thus left for determination by the Security Council, upon the advice of the Military Staff Committee. In its report of 30 April 1947 on 'General Principles Governing the Organisation of the Armed Forces made available to the Security Council by Member Nations of the United Nations' the Military Staff Committee made certain unanimous recommendations in this respect,² which were provisionally approved by the Security Council at its 142nd and 143rd meetings on 18 and 20 June of that year.³

It follows from the articles which were thus agreed upon that the forces are to be composed of units which are normally maintained as components of national armed forces (Article 3). They are to be employed only by decision of the Security Council (Article 18), although two of the permanent members felt that exception should be made in case of self-defence and national emergency (Article 17). The forces are to remain under exclusive national command 'except when, having been made available to the Security Council, on its call, they will operate under its authority' (Article 36). When called upon for action under Article 42 of the Charter, 'they shall come under the control of the Security Council (Article 37) and 'the Military Staff Committee shall be responsible, under the Security Council, for their strategic direction' (Article 38). On the question of command, agreement was reached only on the following provisions:

¹ Goodrich and Hambro, *op. cit.*, p. 292; cf. Article 43 (3).

² Report of the Military Staff Committee, *S.C.O.R.*, 1947, Special Suppl. No. 1.

³ Text as approved in *Repertory of Practice of U.N. Organs*, vol. 2, p. 396; and in Sohn, *Cases and Materials on World Law* (Brooklyn, 1950), p. 834.

Article 39

The command of national contingents will be exercised by commanders appointed by the respective Member Nations. These contingents will retain their national character and will be subject at all times to the discipline and regulations in force in their own national armed forces.

Article 40

The commanders of national contingents will be entitled to communicate directly with the authorities of their own country on all matters.

There was also agreement that the Security Council might appoint a supreme or over-all commander or commanders (for different theatres of war), but no specific provision was adopted because of disagreement as to whether it would be appropriate to add that the Security Council should also have the authority to appoint commanders-in-chief of air, sea or land forces acting under the supreme commander or commanders (Article 41). Those resisting this addition did so because they felt that it was premature to make provisions for the chain of command until one knew the situation that might arise, and because they were in doubt as to whether the appointments should be made by the Security Council or by the supreme commander. They did not suggest that the appointment should be a national responsibility. Replacements, supplies and transportation are a national responsibility (Article 29). Member States are also to retain their national sovereignty and their 'control and command over bases and other facilities placed at the disposal of the Security Council' (Article 27).

The provisions of the Charter clearly envisage that the national contingents shall be under much closer direction by the Organization than was envisaged by the Covenant. And so do the articles proposed by the Military Staff Committee and provisionally approved by the Security Council. The intention appears to be that the supreme direction of the military operations shall be exclusively in the hands of the United Nations and that the commanders of national contingents shall take their operational orders from the United Nations, not from their national Governments. It is true that the national commanders are to have a right to communicate with their national Governments 'on all matters'. However, this cannot mean that the commanders may refuse to carry out orders of the United Nations commander, but merely that they may ask their Governments to take the matter up with the United Nations or its supreme command.¹ And the Government itself has no *right* to demand a reversal of the order. It has even, rightly, been questioned whether, *in the special*

¹ In Korea a similar system was adopted in the course of the United Nations action. The agreements concluded by the United States with the several United Nations Members contributing forces to that action expressly provided that orders of the United Nations Command were to be carried out as given and that 'in the event of disagreement with them, formal protest may be presented subsequently'. See below, p. 365. Cf. also below, p. 372.

agreements to be concluded under Article 43 of the Charter, the national Governments would be entitled to insist that their armed forces be used only within certain areas.¹ Indeed, it appears that with regard to *operational* and *external* relations, the supreme power of decision is intended to lie with the United Nations.² In the field of *internal* relations, including discipline and criminal jurisdiction, the power lies with the national Government.³

Unfortunately, the members of the Military Staff Committee and of the Security Council were unable to agree upon the composition and size of the force and certain other subjects. This prevented the Council from adopting finally the articles proposed by the Military Staff Committee, and the special agreements provided for in the Charter have not therefore been concluded.

4. *The force in Korea*

For this reason, when the war in *Korea* broke out in 1950,⁴ the Security Council was unable to invoke the duty of Member States under Articles 43 et seq. to contribute national contingents. Nor was there time to establish a force by individual enlistment. So the Council, without referring to any article of the Charter, but apparently basing itself upon Article 39, *recommended* that Member States furnish assistance and, subsequently, made basic provisions for the command of contingents offered voluntarily by Member States pursuant to this recommendation. On the first day of the attack, 25 June 1950, the Council—by 9 votes to 0, with 1 abstention and one permanent member absent—adopted a resolution determining that the armed attack upon the Republic of Korea constituted a 'breach of the peace'. The resolution called for the immediate cessation of hostilities, for the withdrawal of troops and for a report from the United Nations Commission on Korea. It concluded by calling upon all Members to render every assistance to the United Nations in the execution of the resolution. Two days later the Council, noting that North Korea had not complied with the

¹ Goodrich and Hambro, *op. cit.*, p. 294; Kelsen, *op. cit.*, pp. 751-2.

² The terminology of Article 48 to which Kelsen (*op. cit.*, p. 763) draws attention cannot alter this conclusion. Article 18 is concerned with entirely different problems and the terminology incidentally employed should not be given too wide significance.

³ See also the discussion below, pp. 409-11.

⁴ On the role played by the United Nations in the Korean war, see *Korea and the United Nations*, U.N. publication, 1950, 1/8; the First Report of the Collective Measures Committee, G.A.O.R., 4th session, Suppl. No. 13, pp. 45-48; Padelford, 'The United Nations and Korea', *International Organisation*, 5 (1951), pp. 685-708; and Goodrich, 'Korea: Collective Measures against Aggression', *International Conciliation* (1953), No. 494. The factual information related in the following has been drawn partly from these publications, and partly from official United Nations documents including the *Annual Reports of the Secretary-General*, the *Reports of the Security Council*, and the *Repertory of Practice of U.N. Organs*; see also Frankenstein, *L'Organisation des Nations Unies devant le conflit coréen* (Paris, 1952). On the constitutionality of the United Nations action, see below, Chapter IV.

resolution, recommended—by 8 votes¹ to 1, with one abstention and one permanent member absent—that the Members ‘furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security’. United States forces had at that time already intervened.

On 7 July 1950, after a number of other Members had sent combat units or had decided to do so, or had offered other assistance, the Security Council—by 7 votes to 0, with three abstentions and one permanent member being absent—adopted a third basic resolution. In this resolution the Council recommended that all Members providing military forces and other assistance should make these available to a unified command under the United States, which was requested to designate the commander of the forces and ‘to provide the Council with reports on the course of action taken under the unified command’. The Unified Command was authorized at its discretion to use the United Nations flag ‘concurrently with the flags of the various nations participating’. In introducing the draft resolution the representative of the United Kingdom observed that there was no need for further machinery at this stage, since the Council’s functions were not operational but to co-ordinate the efforts of Members.² Finally, on 31 July 1950, the eve of the return of the Soviet Delegation to the Council, the Council adopted a resolution on international relief for the civilian population of Korea, also under the direction of the Unified Command (‘the responsibilities being carried out by the Unified Command on behalf of the Security Council’).³

This was the end of Security Council action, since on 1 August 1950 the representatives of the Soviet Union returned to the Council table, and unanimity between the permanent members was then no longer possible. All the Council could do thereafter—apart from discussing and rejecting draft resolutions—was to receive the reports on the military situation which the Unified Command submitted periodically through the United States Mission to the United Nations.⁴

From then on, and even before the matter had been taken off the Council’s agenda on 31 January 1951, official United Nations action was taken by the General Assembly, but only on political issues, such as the question

¹ One of these did not vote at the meeting because of lack of instructions, but informed the Council later of his affirmative vote.

² *S.C.O.R.*, 1950, 476th meeting, p. 4, discussed fully below, pp. 438–9 and 463–5.

³ For an account of the discussion in the Security Council, with the texts of the resolutions, see *Report of the Security Council*, 1949–50, pp. 21–29, and *Korea and the United Nations*, U.N. publication, 1950, 1/8.

⁴ The reports were published by the United States Department of State; see, for example, publication 4108, containing the *Eleventh Report*, dated 31 January 1951, and covering the period 1–15 December 1950.

of the aims to be attained, alleged violations of the laws of war and neutrality,¹ the Chinese intervention, the negotiation of an armistice and violations of the armistice agreement.² Military matters were, in accordance with the Security Council's resolution of 7 July and the British observations introducing it, left to the United States Government, as the Unified Command.

The first United States combat units in Korea were under General MacArthur's Far East Command in Tokyo. (General MacArthur was concurrently Commander-in-Chief, United States Army Forces, Pacific, and Supreme Commander for the Allied Powers in Japan.) The first British Commonwealth units were similarly placed under the operational control of the Far East Command. After the adoption by the Security Council of the resolution of 7 July, the President of the United States appointed General MacArthur as 'Commanding General of the military forces which the members of the United Nations place under the unified command of the United States'. The later recall of General MacArthur and appointment of a new commander was also made by the President, without consulting the United Nations.

On 25 July 1950 General MacArthur established the 'United Nations Command' with headquarters in Tokyo. This was practically identical with the Far East Command and was composed exclusively of United States officers. Later, however, these were joined by a British Commonwealth Deputy Chief of Staff. The chain of command, and of reporting to the United Nations, was from the United Nations Command, through the Chief of Staff of the United States Army, to the Joint Chiefs of Staff, to the Secretary of Defence and finally to the President of the United States.

Fifteen Member States³ in addition to the United States made combat units available to the United Nations Command and placed them under its orders. Other Members contributed medical units, ships, supplies, &c., which were equally placed under the United Nations Command.⁴ The offers of combat units and other assistance were made to the Secretary-General, pursuant to his circular cables of 28 June and 14 July requesting assistance.⁵ The Secretary-General transmitted the offers, through the United States Mission to the United Nations, to the United States Government, which then negotiated directly with the Member States concerned and which decided what offers should be accepted. Formal or informal agree-

¹ Cf. below, pp. 422-3.

² Cf. below, pp. 416-17.

³ Australia, Belgium, Colombia, Canada, Ethiopia, France, Greece, Luxembourg, the Philippines, the Netherlands, New Zealand, Thailand, Turkey, Union of South Africa, the United Kingdom.

⁴ Table of offers of assistance as of 23 April 1951 in *International Organisation*, 5 (1951), p. 659.

⁵ The Secretary-General also maintained a Personal Representative at the United Nations Command in Tokyo for the purpose of transmitting its requests for assistance to Member States and for performing general liaison functions.

ments were then entered into between the United States and each contributing State.¹ The formal agreements were similar or identical in terms. The contingents were equipped and paid by their national Governments, but supplies were partly furnished by the United States, against payment from the Government contributing the contingent.²

The ground forces contributed by Members were incorporated as units into divisions of the United States Eighth Army and brought under the operational command of United States divisional officers, except that after 27 July 1951 all units of the British Commonwealth were combined into one division of their own under the Eighth Army. Naval and air units of United Nations Members were similarly attached to the Seventh United States Fleet and to the Far Eastern Air Force, respectively. Each service was under a United States service commander. The senior military representative of each Member State contributing forces was accorded direct access to the United Nations Commander on 'matters of major policy affecting the operational capabilities of the forces concerned'. Likewise, the senior military representative in the theatre of each State contributing military forces was given the right of direct communication with his Government on administrative matters affecting the forces of his Government.³ The agreements with the participating States provided, however, that 'all orders, directives, and policies of the Commander' issued to the unit 'or its personnel shall be accepted and carried out by them as given' and that 'in the event of disagreement with such orders, directives, or policies, formal protest may be presented subsequently'.⁴

The forces of the Republic of Korea were similarly at an early stage brought under United States command, and were incorporated into United States units, first as small groups and later as distinct divisions. Formal provision for the assignment to General MacArthur's command of all military forces of the Republic of Korea was made by an exchange of letters between him and the President of the Republic on 15-18 July 1950,⁵ before the formal establishment of the United Nations Command.

Some of the national contingents wore national uniforms, while others wore United States uniforms bearing their national insignia. The forces of Greece, the Netherlands and Thailand wore shoulder patches embodying

¹ Goodrich, in *International Conciliation*, No. 494, p. 158.

² See Article 1 of the agreements concluded with Norway, Sweden, the Netherlands and the Union of South Africa, respectively, concerning the participation in 'United Nations operations in Korea' of Norwegian and Swedish field hospitals and Netherlands and South African armed forces; *U.N. Treaty Series*, vol. 140, p. 319; vol. 148, p. 83; and vol. 177, pp. 237, 245. The contributing States also paid for supplies from sources other than the United States; cf. Article 5 and the Agreement between the United States and the Republic of Korea of 28 July 1950, par. 5; *ibid.*, vol. 140, p. 65.

³ *G.A.O.R.*, 6th session, Suppl. No. 13, p. 46.

⁴ See Article 7 of the four first Agreements cited in n. 2, above.

⁵ Text in the *Department of State Bulletin*, 23 (1950), p. 206, and (in full) in S/1626 (mimeographed only).

the United Nations emblem, while the Canadians wore a shoulder patch that included the United Nations wreath around a maple leaf, and the French, a red, white and blue badge with the French abbreviation for United Nations. Of the United States forces, only the 2nd Logistical Command wore a shoulder patch that included part of the United Nations emblem—the wreath.¹

The United States Government kept the other Member States contributing forces informed of the military developments—through weekly meetings with their diplomatic representatives in Washington (the Committee of Sixteen) and otherwise. But there was little or no real advance consultation on military matters, except in some cases where they had political implications. There is no indication that the Republic of Korea, which was not a member of the Committee of Sixteen, was consulted.²

The *General Assembly*, like the Security Council, did not interfere with purely military matters. However, it did on some occasions adopt resolutions on political, relief and other matters of wider scope. Thus on 7 October 1950, when the North Koreans had been driven back to the 38th Parallel and the political question arose as to whether they should be pursued into North Korean territory, the General Assembly adopted a Resolution (376 (V)) recommending that 'all appropriate steps be taken to ensure conditions of stability throughout Korea' and that constituent acts be taken 'for the establishment of a unified, independent and democratic government'. This was interpreted, by the United Nations Command, as a green light for crossing the parallel. The resolution, furthermore, established a new United Nations Commission for the Unification and Rehabilitation of Korea, and resolved that an Interim Committee of this Commission should consult with and advise the 'United Nations Unified Command' on the political and relief questions dealt with in the resolution.

By its Resolution 483 (V) of 12 December 1950 the General Assembly requested the Secretary-General to make arrangements with the Unified Command 'for the design and award, under such regulations as the Secretary-General shall prescribe, of a distinguishing ribbon or other insignia for personnel which has participated in Korea in the defence of the principles of the Charter of the United Nations'. This implied refutation of the view advanced by the representative of Poland that the Korean war was a concern of the United States and not of the United Nations and that the United Nations did not have the power to award decorations because it was not a State and because the power was not laid down in the Charter.³ Later, by Resolution 699 (VII), the General Assembly, following anew the

¹ *United Nations Bulletin*, 11 (1951), p. 342.

² See Goodrich, in *International Conciliation*, No. 494, pp. 167-8; cf. pp. 175-6 and 181.

³ *G.A.O.R.*, 5th session, Sixth Committee, Summary Records, pp. 257-61.

pattern of national armies,¹ declared 'to have "Died for the United Nations" all those who are killed in the course of an action or a mission on behalf of the Organization in connexion with the maintenance of international peace and security, the prevention or ending of hostilities, or the suppression of aggression'. In the preamble the personnel participating in Korea under the United Nations Command were mentioned expressly alongside members of other missions of the United Nations whose status as United Nations organs is usually not disputed. Indeed, although prompted by the war in Korea, this resolution was in general terms and was applicable also to other United Nations actions.

The political problems raised by the Chinese intervention gave the General Assembly occasion to intervene in several instances. In its Resolution 498 (V) of 1 February 1951,² the Assembly—by 44 votes to 7, with 9 abstentions—found the People's Republic of China to have 'engaged in aggression', affirmed 'the determination of the United Nations to continue its action in Korea to meet the aggression' and called for continued assistance to the United Nations action in Korea. The resolution also requested the members of the Collective Measures Committee³ 'to consider additional measures to be employed to meet the aggression'. Such additional measures were adopted by General Assembly Resolution 500 (V) of 18 May 1951, which provided for an embargo on war materials.

The General Assembly earlier made an effort to secure a cease-fire by its Resolution 384 (V) of 14 December 1950 and by subsequent direct exchange of communications with the Government of the People's Republic of China.⁴ However, this initiative led to nothing, and when *armistice* negotiations did start, on 10 July 1951, this was brought about by direct contact between the United Nations Command and the Commander on the opposing side.⁵

The armistice negotiations, which lasted nearly two years, were conducted by the United Nations Command under instructions which in the final analysis were given by the United States Government. Members with armed forces in Korea were kept informed, and the advice of some of them was taken into account to some extent. The Republic of Korea was represented by an officer in the armistice delegation of the United Nations Command, but there is no evidence that Korea had any real part in the

¹ Cf. the French memorandum of 16 July 1952 explaining the proposal (A/2145, *G.A.O.R.*, 7th session, Annexes A.i.59).

² Text in *International Organisation*, 5 (1951), p. 421.

³ Below, p. 371.

⁴ See *Annual Report of the Secretary-General*, 1950-1, pp. 47-52; cf. the text of the first 'Report of the Committee of Three' of 2 January 1951 in *International Organization*, 5 (1951), pp. 233-5, and in *G.A.O.R.*, 5th session, Annexes, A.i.76, p. 6; and the text of the reply of the People's Republic of China of 17 January 1951, *ibid.*, p. 14. Cf. also General Assembly Resolution 498 (V), par. 7.

⁵ *Annual Report of the Secretary-General*, 1950-1, p. 54.

directions or decisions.¹ The United Nations was kept currently informed of the armistice negotiations by the Unified Command through the United States Mission to the United Nations. When a deadlock had arisen over the question of the repatriation of prisoners of war, the General Assembly, by its Resolution 610 (VII) of 3 December 1952, made certain proposals which laid the foundation for success at a later stage, and again communicated directly with the Governments on the opposing side.²

- The communications, together with the related resolutions and reports, offer no clear indication as to whether the Assembly was acting as the supreme political organ of one party to the conflict, or as the universal organization for mediation and world peace, or both.³

On 11 April 1953 an agreement for the Repatriation of Sick and Injured Captured Personnel was signed at Panmunjom by a representative of the 'Korean People's Army and Chinese People's Volunteers Liaison Group' and a representative of the 'United Nations Command Liaison Group'. The agreement was taken note of by the General Assembly by its Resolution 705 (VII) of 18 April 1953. On 8 June 1953 an agreement was signed on the exchange of prisoners of war. Finally, on 27 July 1953, followed the signature of the Armistice Agreement 'between the Commander-in-Chief, United Nations Command, on the one hand, and the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers, on the other hand'. The United Nations Commander, General Clark, and another United States officer signed for the United Nations Command.⁴ The agreements were not submitted to the United Nations until they had been signed and entered into force. Then, pursuant to its Resolutions 507 (VI) of 5 February 1952 and 705 (VII) of 18 April 1953, the General Assembly met and adopted on 28 August 1953 a resolution (711 (VII)) noting with approval the Armistice Agreement which had been concluded. In another resolution of the same day (712 (VII)), the General Assembly saluted 'the heroic soldiers of the Republic of Korea and of all those countries which sent armed forces to its assistance' and expressed its satisfaction that 'the first efforts pursuant to the call⁵ of the United Nations to repel armed aggression by collective military measures have been successful', and 'its firm conviction that this proof of the effectiveness of col-

¹ Goodrich, in *International Conciliation*, No. 494, pp. 178-81.

² *Annual Report of the Secretary-General*, 1952-3, p. 21, and A/2354.

³ See *Annual Report of the Secretary-General*, 1952-3, pp. 18-21, on the role played by the 'neutral' Members (India) in the elaboration of the resolution. See also Goodrich, in *International Conciliation*, No. 494, p. 182, on the distinction which was made between those Members which had combat forces in Korea and those Members which were designated as 'neutrals'.

⁴ See Vachter, *The Story of the Korean Military Armistice Negotiations* (New York, 1953), with text of the agreements.

⁵ This term (which coincides with that employed in Article 43 of the Charter) was adopted in lieu of 'under the auspices', as proposed originally. See *Annual Report of the Secretary-General*, 1953-4, pp. 8-10.

lective security under the United Nations Charter will contribute to the maintenance of international peace and security'.

During the campaign, the various organs of the United Nations, the United States Government, the other participating Member Governments, and the United Nations Command at most stages fairly consistently used the denomination 'United Nations Command'.¹ Moreover, they most frequently referred to the forces as 'United Nations Forces'² and to the action as a 'United Nations action'³ or as 'United Nations operations'.⁴ However, they were also frequently referred to as forces or action of the Member States, with or without an additional phrase to indicate connexion with the United Nations.⁵ The divergent terminology is illustrated in the preambles to the agreements concluded by the United States with the several Members contributing forces. In these, the United States Government was referred to as 'the executive agent of the *United Nations Forces in Korea*', while the Commander, in the same sentence, in keeping with the original presidential appointment of 8 July 1950, was referred to as 'the Commanding General of the Armed Forces of the *Member States* of the United Nations in Korea'.⁶ The term 'on behalf of the Security Council' was also used occasionally.⁷

The facts reviewed above leave little doubt that the United Nations

¹ An early Soviet proposal to delete the mention of the 'United Nations Command' in the Security Council's Resolution of 10 November 1950 was rejected by the Council; *ibid.*, 1950-1, p. 24. The term 'United Nations Command' was used also by the Governments opposing the United Nations Force in addressing communications to it (*ibid.*, 1952-3, p. 14), as well as in the Armistice Agreement.

² See, for example, the preambles of the agreements reproduced in *U.N. Treaty Series*, vol. 140, p. 314; vol. 148, p. 78; and vol. 177, pp. 234 and 242. General Assembly Resolution 376 (V) used the term 'United Nations armed forces' and 'the United Nations Unified Command'.

³ This term was employed, for example, in the declaration of the President of the Security Council at the meeting on 7 July 1950 (*S.C.O.R.*, 1950, 476th meeting, p. 2) and by the Norwegian Government in proposing to the National Assembly the allocation of funds for placing a ship at the disposal of the Unified Command (*Stortingsproposisjon nr. 1, Tillegg nr. 21* [1951]). The Secretary-General, at his press conference on 14 July 1950, spoke of 'collective United Nations action' (*Korea and the United Nations*, p. 21).

⁴ See, for example, the titles of the agreements reproduced in *U.N. Treaty Series*, vol. 140, p. 313; vol. 148, p. 77; and vol. 177, pp. 231 and 241.

⁵ When introducing the draft of the Security Council Resolution of 7 July 1950, the U.K. representative spoke of co-ordinating the assistance which it was recommended in the earlier Security Council Resolution that the members should furnish (*S.C.O.R.*, 1950, 476th meeting, p. 3). General Assembly Resolution 711 A (VII) spoke of 'collective military measures' 'pursuant to the call of the United Nations'. The Agreement with Korea of 28 July 1950 spoke of 'forces operating in Korea under the Unified Command of the Commanding General of the Armed Forces of Member States of the United Nations designated by the United States pursuant to the resolutions of the United Nations Security Council of June 25, 1950; June 27, 1950 and July 7, 1950' (*U.N. Treaty Series*, vol. 140, p. 68).

⁶ Italics supplied.

⁷ The United Kingdom, prior to the Security Council's resolution of 7 July 1950, placed its naval forces in Japanese waters 'at the disposal of the United States authorities to operate on behalf of the Security Council in support of South Korea' (*S.C.O.R.*, 1950, Suppl. for June, July and August, p. 28). Australia used similar terms (*ibid.*, p. 34). Other States offered assistance to aid 'the Republic of Korea', 'the United Nations', or 'United Nations efforts' (*ibid.*, and *Report of the Security Council*, 1949-50, pp. 26-27).

Command had full operational direction and control over the national contingents. This was expressly provided in the agreements concluded with the Governments concerned, and was further emphasized by their integration in United States military units which were already under the United Nations Command. It is equally clear that the United Nations Command took its orders from the United States Government, as the Unified Command, and not from the United Nations, nor from the other States contributing forces or from any common organ (committee) of these. The United States Government, for its part, did not take orders from anybody, although it did consult and seek political guidance from the United Nations and from some of the States contributing forces. The United Nations did not interfere at all in the purely military aspects of the operations. And even in political matters it confined itself to making 'recommendations', although in fact these seem to have always been acted upon by the United States Government.

Nevertheless, it remains important that the parties involved on the United Nations side commonly spoke of the forces and the action in terms of United Nations forces and United Nations action, for this strongly suggests that they did not regard the action as a regular 'old-fashioned' coalition-war, but as a collective action within the framework of the United Nations.

5. *The Uniting for Peace Resolution*¹

The experience in Korea demonstrated the feasibility of United Nations action based upon the voluntary contribution of contingents by Member States pursuant to a recommendation by the Security Council. But it was felt that this had been made possible in the Korean war only by three accidental facts: (1) that a United Nations Commission was already present on the scene, (2) that forces of Member States which could be made quickly available were already present in the area, and (3) that one of the permanent members was absent from the Security Council. Since these facts might not repeat themselves in case of any further aggression, it was proposed that the *General Assembly* be put in a position to recommend collective measures and to draw upon national contingents made ready in advance. Accordingly, on 3 November 1950—three months after the return of the Soviet delegation to the Security Council and immediately before the Chinese intervention in Korea was officially reported—the General Assembly adopted, by 52 votes to 5 and with 2 abstentions, the 'Uniting for Peace' Resolution (377 A (V)), the relevant parts of which read:

'The General Assembly, . . .

'*Reaffirming* that the initiative in negotiating the agreements for armed forces

¹ Cf. Kelsen, *Recent Trends in the Law of the United Nations*, pp. 953 et seq.; and Sohn in *American Journal of International Law*, 52 (1958), pp. 233-4.

provided for in Article 43 of the Charter belongs to the Security Council, and desiring to ensure that, pending the conclusion of such agreements, the United Nations has at its disposal means for maintaining international peace and security,

'Conscious that failure of the Security Council to discharge its responsibilities on behalf of all the Member States . . . does not relieve Member States of their obligations or the United Nations of its responsibility under the Charter to maintain international peace and security,

'Recognising in particular that such failure does not deprive the General Assembly of its rights or relieve it of its responsibilities under the Charter in regard to the maintenance of international peace and security,

'Recognising that discharge by the General Assembly of its responsibilities in these respects calls for possibilities of observation which would ascertain the facts and expose aggressors, for the existence of armed forces which could be used collectively; and for the possibility of timely recommendation by the General Assembly to Members of the United Nations for collective action which, to be effective, should be prompt,

A

'1. Resolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security . . . the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary . . .;

B

'3. Establishes a Peace Observation Commission. . . .

C

'8. Recommends to the States Members of the United Nations that each Member maintain within its national armed forces elements so trained, organised and equipped that they could promptly be made available, in accordance with its constitutional processes, for service as a United Nations unit or units, upon recommendation by the Security Council or General Assembly, without prejudice to the use of such elements in exercise of the right of individual or collective self-defence recognised in Article 51 of the Charter;

'10. Requests the Secretary-General to appoint, with the approval of the Committee provided for in paragraph 11, a panel of military experts who could be made available, on request, to Member States wishing to obtain technical advice regarding the organisation, training, and equipment for prompt service as United Nations units of the elements referred to in paragraph 8;

D

'11. Establishes a Collective Measures Committee . . . and directs the Committee . . . to study and make a report to the Security Council and the General Assembly . . . on methods, including those in section C of the present resolution, which might be used to maintain and strengthen international peace and security in accordance with the Purposes and Principles of the Charter, taking account of collective self-defence and regional arrangements (Articles 51 and 52 of the Charter).'

The Collective Measures Committee subsequently submitted three

¹ *G.A.O.R.*, 6th session, Suppl. No. 13; 7th session, Suppl. No. 17; 9th session, Annexes A.i.19.

partly repetitive reports¹ to the General Assembly which took note of them and made certain recommendations to Member States, while directing the Committee to continue its studies.¹ In the first report (1951) the Committee discussed, *inter alia*, basic procedures and principles which could be applied 'to co-ordinate the efforts of States and to integrate national contingents promptly and effectively into a combined force acting on behalf of the United Nations'.² The Committee recommended that the United Nations should authorize a State or group of States to '*act on its behalf*' as '*executive military authority*' which should have 'full responsibility for the co-ordination and strategic direction and control of the United Nations forces, within the framework of the policies and objectives as expressed through such resolutions as the United Nations may adopt at any stage of the collective action'. The 'executive military authority' was to determine the needs for assistance and negotiate agreements directly with the victim State and with the several Member States concerning the contributions they might be willing to make. The Committee stated, furthermore:

'The executive military authority should be authorised to designate the Commander-in-Chief of the United Nations forces and to replace him. Where the executive military authority consists of a group of States, the Commander-in-Chief should be designated by mutual agreement. The Commander-in-Chief's authority should be defined by the executive military authority, and he should receive instructions from that authority.'³

According to the Committee 'national contingents should be provided with their own commander and officers by the contributing State concerned'. But it added:

'Military contingents should come under the sole operational control of the United Nations Commander-in-Chief on their arrival in his theatre or theatres of operations. The senior military representative in the theatre of operations of each State contributing military forces should, however, have direct access to the United Nations Commander-in-Chief on national matters and matters of major policy affecting the operational capabilities of the forces concerned. He should also have the right to communicate directly with his government upon administrative matters affecting its forces.'⁴

The Committee proposed, furthermore, that the 'executive military authority' should report regularly to the United Nations and that 'information provided by the Commander-in-Chief on operational developments should be transmitted to the United Nations through the executive military authority'.⁵

The measures proposed by the Committee for the 'identification of the United Nations character of operations' include the following:

'The body deciding upon or recommending military measures should provide that the forces serving under the executive military authority will be known as the United

¹ General Assembly Resolutions 503 A (VI), 703 (VII) and 809 (IX).

² *G.A.O.R.*, 6th session, Suppl. No. 13, p. 24.

³ *Ibid.*, p. 26.

⁴ *Ibid.*, p. 28.

⁵ *Ibid.*, p. 30.

Nations Forces. The Commander-in-Chief should initiate and conduct all operations as Commander of the United Nations Forces, and should issue all orders, reports and instructions, and carry on all relationships, in the name of the United Nations Command. The Security Council or the General Assembly should authorise the use of the United Nations flag in the field, and the Commander-in-Chief should ensure that that flag, in addition to national flags, is used in United Nations operations. Arrangements should be made for the proper identification of personnel and property of the United Nations in the theatre of operations. Similarly, consideration should be given to providing a United Nations service medal for the forces engaged in future United Nations military action.¹

It will be noted that all the above is a faithful reproduction of the system adopted in the Korean conflict, which was at that time still in its first year. In its second report (1952) the Committee reproduced and recommended for study certain proposals by the Secretary-General which go beyond the procedure adopted in Korea. The Secretary-General proposed that 'States whose resources would not permit of the contribution of self-contained combat or ancillary units as contemplated in paragraph 8 of the "Uniting for Peace" resolution . . . could alone or jointly with other States similarly placed, organise in advance combatant or auxiliary units (such as labour or transport units) of a nature adequate for effective integration into a United Nations force.' In addition, individual volunteers might be enlisted and trained on a part-time basis on behalf of the United Nations through the existing national military establishments of States willing to do so. Such United Nations Volunteer Reserve units could be incorporated in national military reserve establishments as special United Nations reserve units or groups, and could, in case of need, be mobilized for service by the United Nations as part of a national force contributed by the State concerned or as a separate unit. In either case, the international character of the reserve component should be recognized and preserved. Co-operating States would be asked to meet the cost of recruiting, equipping and training the United Nations volunteer reservists as part of their over-all advance contribution to collective security under the United Nations.²

The recommendations of the Collective Measures Committee, including the recommendation to the effect that the forces mobilized under the Uniting for Peace Resolution should be organized and commanded in essentially the same manner as the forces in Korea, were not made in categorical terms in the sense that they were presented as the only way in which the United Nations force could operate. Moreover, the recommendations were never adopted by the General Assembly, but merely taken note of. It is thus quite clear that they do not constitute any binding directives. Indeed, the Security Council and the General Assembly are free to organize the national contingents called for in paragraph 8 of the Uniting

¹ Ibid., p. 28; cf. above, p. 366, on General Assembly Resolution 483 (V).

² *G.A.O.R.*, 7th session, Suppl. No. 17, pp. 12-13.

for Peace Resolution in any manner they see fit which does not contravene the United Nations Charter or the desires of the contributing States.¹

Less than three months after its adoption, the General Assembly applied for the first time the Uniting for Peace Resolution, without specifically mentioning it, by extending the United Nations action against North Korea to be directed also against the intervening forces of the Central People's Government of the People's Republic of China.²

6. *The United Nations Emergency Force in the Middle East*³

The Uniting for Peace Resolution which had thus been applied without being specifically mentioned in extending the United Nations military action in Korea against the intervening Chinese forces was invoked, *eo nomine*, after the attack⁴ upon Egypt⁵ on 29 October 1956 by Israel and, later, by France and the United Kingdom. The Security Council, being unable to act because of French and United Kingdom negative votes, called an emergency special session of the General Assembly, as provided in the Uniting for Peace Resolution, 'in order to make appropriate recommendations'.⁶ The Assembly adopted on 2 November 1956 Resolution 997 (ES-I) urging the parties to agree to an immediate cease-fire (par. 1) and promptly to 'withdraw all forces behind the armistice lines, to desist from raids across the armistice lines into neighbouring territory and to observe scrupulously the provisions of the armistice agreements' (par. 2). The resolution also urged, generally, that 'steps be taken to reopen the Suez Canal and restore secure freedom of navigation' (par. 4).

¹ On this and another constitutional aspect see below, Chapter IV, § 4 (c), esp. pp. 464-8; cf. pp. 440-1.

² General Assembly Resolutions 498 (V) and 500, reported above, p. 367.

³ The texts of the basic documents of legal importance are collected in E. Lauterpacht, *The United Nations Emergency Force* (London, 1960). Three of the basic documents may also be found in *U.N. Treaty Series*, vol. 271, pp. 235-85. For an official summary of these and other facts of lasting importance, see 'Summary Study of the Experience Derived from the Establishment and Operation of the Force', *Report of the Secretary-General*, 9 October 1958, *G.A.O.R.*, 13th session, Annexes, A.I.65, pp. 8-33. For unofficial descriptions and commentaries see, in addition to the general literature cited at the beginning of this article: Goodrich and Rosner, 'The United Nations Emergency Force', *International Organisation*, 11 (1957), pp. 413-30; Pearson, 'Force for U.N.', *Foreign Affairs*, 35 (1956-7), pp. 395-404; Armstrong, 'The U.N. Experience in Gaza', *ibid.*, pp. 600-19; Maxwell Cohen, 'The United Nations Emergency Force: A Preliminary View', *International Journal*, 12 (1957), pp. 109-27; Frye, *A United Nations Peace Force* (New York, 1957); Spry, 'Canada, the United Nations Emergency Force and the Commonwealth', *International Affairs*, 33 (1957), pp. 289-300; 'Report of Committee on Study of Legal Problems of the United Nations', *Proceedings of the American Society of International Law* (1957), pp. 205-29; Stone, *Aggression and World Order* (London, 1958), pp. 184 et seq.; Chaumont, 'La Situation juridique des États membres à l'égard de la force d'urgence des Nations Unies', *Annuaire français de droit international*, 4 (1958), pp. 399-440.

⁴ The United Nations did not formally qualify the invaders as aggressors, as it had done in Korea, see Chaumont in *Annuaire français de droit international* (1958), p. 418, and Chaumont, *L'organisation des Nations Unies* (Paris, 1959), p. 71.

⁵ The 'United Arab Republic' was established only after most of the events described in the following had taken place. 'Egypt' is therefore used consistently in the present text.

⁶ *Report of the Security Council*, 1956-7, pp. 37-38.

On the following day the Secretary-General reported to the Assembly that France and the United Kingdom had declared themselves willing to stop military action if, *inter alia*, both the Egyptian and the Israeli Governments agreed to accept a United Nations Force to keep the peace; and if the United Nations decided to constitute and maintain such a Force until an Arab-Israeli peace settlement was reached and until satisfactory arrangements had been agreed in regard to the Suez Canal, both agreements to be guaranteed by the United Nations.¹

By Resolutions 998 (ES-I) of 4 November, 1000 (ES-I) of 5 November and 1001 (ES-I) of 7 November 1956 the General Assembly thereupon without a negative vote² established an emergency international United Nations Force—later referred to as the United Nations Emergency Force (U.N.E.F.). The purpose, organization, status, functioning and financing of the Force were defined (a) in the Assembly's resolutions of 5 and 7 November 1956, (b) in the Second and Final Report of the Secretary-General on the Plan for an Emergency International United Nations Force³ approved by General Assembly Resolution 1001; (c) in a number of subsequent General Assembly resolutions;⁴ (d) in an 'Aide-memoire on the Basis for Presence and Functioning of UNEF in Egypt', approved by Egypt and the General Assembly in November 1956;⁵ (e) in another agreement concluded by the Secretary-General with Egypt on 8 February 1957 concerning the status of U.N.E.F. in Egypt;⁶ (f) in the 'Regulations for the United Nations Emergency Force' enacted by the Secretary-General on 20 February 1957;⁷ and lastly, (g) in a letter dated 21 June 1957 from the Secretary-General to the States providing contingents. This letter of 21 June 1957 refers to or reproduces as annexes most of the documents cited above and constitutes, together with the replies of each 'participating' State, the basic agreements between these States and the United Nations.⁸

The purpose of the Force was not to fight an aggressor, as in Korea, but 'to secure and supervise the cessation of hostilities' agreed to by the parties 'in accordance with all the terms of General Assembly Resolution 997 (ES-I)'.⁹ In accordance with the second operative paragraph of this resolution

¹ *G.A.O.R.*, 1st emergency special session, Annexes, A.i.5, p. 3.

² The votes were, respectively, 57-0-19, 57-0-19 and 64-0-12; *ibid.*, plenary meetings, pp. 71, 89 and 126.

³ *Ibid.*, Annexes, A.i.5.

⁴ 1089 (XI), 1090 (XI), 1121 (XI), 1122 (XI), 1125 (XI), 1126 (XI), 1151 (XII); [1263 (XIII), 1337 (XIII), 1441 (XIV), 1442 (XIV), 1575 (XV)].

⁵ *G.A.O.R.*, 11th session, Annexes, A.i.66, p. 9.

⁶ *Op. cit.*, p. 52; *U.N. Treaty Series*, vol. 260, p. 61, and vol. 271, p. 145.

⁷ *Ibid.*, vol. 271, p. 169.

⁸ Text in *ibid.*, vol. 271, pp. 135 (Finland), 187 (Sweden) and 223 (Norway); vol. 274, pp. 47 (Canada), 61 (Denmark), 199 (Brazil) and 233 (India); and vol. 277, p. 191 (Yugoslavia). Colombia and Indonesia did not reply to the Secretary-General's letter and subsequently withdrew their contingents (as did Finland). The Secretary-General's letter is also reproduced in *G.A.O.R.*, 13th session, Annexes, A.i.65, p. 33.

⁹ General Assembly Resolution 1000 (ES-I).

and in the light of subsequent developments, the Force has performed two principal tasks: first, it entered the areas occupied by the invading forces as these withdrew, to maintain quiet (it also performed temporarily certain administrative duties) and to turn the areas over to Egypt. Secondly, after the complete withdrawal of the invading troops, the Force has been stationed on the Egyptian side of the Egyptian-Israeli armistice demarcation line and the international border south of the Gaza strip, patrolling these lines in order to prevent incidents across them,¹ and apprehending infiltrators and turning them over to the local police.² Thus U.N.E.F. is 'more than an observer's corps, but in no way a military force temporarily controlling the territory in which it is stationed'.³

The Force is equipped with normal regimental weapons⁴ and with means of transportation and reconnaissance—including motor vehicles and aircraft—but not with heavy arms. The troops have a right to fire in self-defence. They are never to take the initiative in the use of arms, but may respond with force to an armed attack upon them, including attempts to use force to make them withdraw from positions which they occupy under orders from the Commander.⁵ It has been said that U.N.E.F. serves by being present and by acting as a plate-glass window—not capable of withstanding assault but nevertheless a lightly armed barrier that all see and tend to respect.⁶

As we have seen, in Korea the United Nations had entrusted to one of its Member States the task of organizing the Force and directing its operations, and the Collective Measures Committee had also recommended this system for military action under the Uniting for Peace Resolution. In the case of U.N.E.F., however, the Organization chose itself to assume these functions.⁷ The General Assembly appointed a *Commander* of the Force—as a regular United Nations official, responsible to the Organization and fully independent of the policies of any one nation—to organize the Force 'in consultation with the Secretary-General as regards size and composition'.⁸ He was entrusted with full command authority and operational responsibility for the performance of the functions assigned to the Force by the United Nations and for the deployment and assignment of troops placed at the disposal of the Force, though he was to exercise this authority and

¹ Secretary-General's Summary Study, *G.A.O.R.*, 13th session, Annexes, A.i.65, pp. 15–16.

² *Ibid.*, 12th session, Annexes, A.i.65, p. 6.

³ Par. 12 of the Secretary-General's Second and Final Report, *G.A.O.R.*, 1st emergency special session, Annexes, A.i.5, p. 21; cf. Secretary-General's Summary Study, pars. 15 and 77.

⁴ Secretary-General's Summary Study, loc. cit., p. 13; cf. status agreement with Egypt, par. 22.

⁵ Secretary-General's Summary Study, loc. cit., pp. 17 and 31.

⁶ *International Review Service*, 3 (1957), No. 33, p. 19.

⁷ On the relationship of U.N.E.F. to the Uniting for Peace Resolution and the proposals of the Collective Measures Committee, see below, pp. 440–1; cf. above, pp. 373–4.

⁸ General Assembly Resolutions 1000 (ES-I) and 1001 (ES-I) par. 4; cf. Second and Final Report of the Secretary-General, par. 4 (a), and Secretary-General's Summary Study, par. 13.

responsibility 'in consultation with the Secretary-General'.¹ Several other matters—in the administrative, financial, political and legal field—were entrusted to the Secretary-General,² but the day-to-day administration was to be and is carried out by the Commander and his staff. The Secretary-General, in consultation with the Advisory Committee, has issued Regulations for the Force; and the Commander of the Force has issued orders consistent therewith and subject to review by the Secretary-General.³ As expressed by the Secretary-General, the Commander has 'the position of an international civil servant responsible for the discharge of his task to the Assembly, but administratively integrated with the United Nations organisation and under instructions from the Secretary-General'.⁴ This position 'combines leadership of the Force with the role of representative of the United Nations. Much the same qualities are called for in the Chief of Staff of UNTSO,⁵ although the military observers in UNTSO do not form a military organization in the UNEF sense and their functions are quite different. Both operations, however, combine political and administrative with military functions.'⁶

It will be seen that the functions and powers of the Commander are closely interwoven with those of the Secretariat. This fact is also reflected in the composition of his staff. He was authorized to recruit the *military* members of his command from the observer corps of the United Nations Truce Supervision Organization for Palestine (U.N.T.S.O.) and directly from various Member States.⁷ In fact, they were recruited first from U.N.T.S.O. and later from among the officers of national contingents.⁸ The *civilian* staff of the Commander is, in the first place, made up of members of the United Nations Secretariat, detailed by the Secretary-General to serve with the Command. These include administrative, financial, procurement, political, legal, information and other officers, as well as the United Nations Field Service,⁹ which performs technical services, notably with regard to external communications and security. Additional personnel are hired locally by the Commander under terms of employment prescribed by him.¹⁰ Only the military members of the staff, together with the Commander and the members of national contingents, are technically

¹ U.N.E.F. Regulations 11 and 16.

² U.N.E.F. Regulation 15; cf. General Assembly Resolutions 1000 (ES-I), par. 4 and 1001 (ES-I), par. 7.

³ U.N.E.F. Regulation 4.

⁴ Secretary-General's Summary Study, par. 76; cf. pars. 84, 127 and 169.

⁵ Above, p. 354, n. 3.

⁶ Secretary-General's Summary Study, par. 77.

⁷ General Assembly Resolution 1000 (ES-I).

⁸ Secretary-General's Summary Study, pars. 37 and 78.

⁹ Above, pp. 353-4.

¹⁰ U.N.E.F. Regulation 19 (c); Status Agreement with Egypt, par. 37, cf. par. 24, and with the Congo, par. 27. The latter goes further in specifying the independence of the host State in this respect. However, there can be no doubt that the local personnel of U.N.E.F. are also international officials, subject only to the authority of the United Nations in respect of their official functions and their relationship of employment cf. below, p. 448.

considered 'members of the Force'.¹ Nor does this term include the members of the staff of the Secretary-General *at headquarters* who are concerned with the Force. In addition to his regular civilian staff, the Secretary-General had, initially, a senior military adviser and three officer assistants attached to his Executive Office as consultants, assisted by a group of military representatives from the countries providing contingents, sitting as an informal military advisory committee. When the operation had been established, however, these arrangements were reduced.² The Secretary-General is, moreover, assisted in his task by an Advisory Committee, composed of himself as chairman and of representatives of five States providing contingents and two States which had offered to do so.³

The field forces are, as in Korea, supplied by various Member States in the form of relatively self-contained *national contingents*. This was necessary 'in order to avoid the loss of time and efficiency which is unavoidable when new units are set up through joining together small groups of different nationalities'.⁴ As in Korea, the national contingents retain their identity and organizational unity, although the demands of service made upon the Force frequently require the deployment of elements of a contingent, whether companies or platoons, in separate sectors.⁵ The contingents are commanded by their own officers. Those contingents which furnish units for more than one functional task designate a contingent commander, in addition to commanders for each functional activity. This contributes to clarification of responsibility in those matters affecting personnel which are subject to national authority.⁶ Some of the contributing Governments also designate 'liaison officers' to represent their interests on the scene of operations and to serve as points of contact. These liaison officers, not being under the authority of the Commander, are not members of U.N.E.F.⁷

The members of the Force, whether serving in national contingents or as part of the United Nations Command, wear their national uniforms with United Nations blue helmets, berets and desert caps and U.N.E.F. badges and insignia.⁸ They also carry United Nations identity cards. The

¹ U.N.E.F. Regulation 5 (*d*); see, however, Regulation 6, cf. Regulation 5 (*b*).

² Secretary-General's Summary Study, pars. 31 and 182.

³ General Assembly Resolution 1001 (ES-I), pars. 6-9.

⁴ Second and Final Report of the Secretary-General, par. 14. In this way it was possible to organize the Force with great speed. Indeed, the first national contingent was reported ready for dispatch on 5 November, the same day as the resolution deciding to set up the Force had been adopted, despite the fact that parliamentary approval had had to be obtained in advance (*ibid.*, Annex 5).

⁵ *G.A.O.R.*, 12th session Annexes, A.i.65, p. 3.

⁶ Secretary-General's Summary Study, par. 80; cf. below, pp. 385-9 (*d*)-(f).

⁷ *Ibid.*, par. 82. The Danish and Norwegian liaison officers also perform the disciplinary and other personnel functions usually vested in the contingent commander, since the regular companies of those two contingents have been joined together under a common battalion commander of alternating nationality.

⁸ U.N.E.F. Regulation 8; Secretary-General's Summary Study, par. 43.

Force, whose functions are exclusively international,¹ flies the United Nations flag,² and its means of transportation and other equipment bear a distinctive United Nations mark and licence.³ The total size of the Force has ranged between 5,000 and 6,000 men, of which little more than half perform active patrolling duty and the rest form part of the supporting units and services, including administration, signals, engineering, supply, transport, workshop, ordnance, medical, dental, postal, pay, provost and movement control.⁴

Military reconnaissance aircraft have been provided by the Royal Canadian Air Force. Air transport to the area of operations has been provided by the same air force, by the air forces of two 'non-participating' Member States and by a civilian airline.⁵ Sea transport of troops and material has been performed by vessels chartered or owned by U.N.E.F., or made available by 'participating'⁶ or other Governments. Some of these vessels have flown the United Nations flag, some their national flag and some both. In Egyptian ports all ships on U.N.E.F. assignments display the United Nations flag.⁷

The Force is a subsidiary organ of the United Nations and in particular of the General Assembly,⁸ and it enjoys the status, privileges and immunities of the Organization in accordance with the Convention on the Privileges and Immunities of the United Nations. This applies also to the property, funds and assets of 'participating' Governments used in the host State.⁹ The Commander and the staff detailed from the United Nations Secretariat to serve with him are entitled to privileges and immunities under the Convention as officials of the United Nations; the military members of the U.N.E.F. Command are entitled to privileges and immunities as experts on mission for the United Nations. Personnel recruited locally enjoy only immunity in respect of official acts as provided in § 18 (a) of the Convention,¹⁰ which is the most basic immunity of an international official. Members of national contingents are not covered by the Convention on the Privileges and Immunities of the United Nations,¹¹ but are accorded largely corresponding privileges and immunities, including immunity in respect of

¹ U.N.E.F. Regulation 6.

² U.N.E.F. Regulation 7; cf. Status Agreement with Egypt, par. 20, and with the Congo, par. 26.

³ U.N.E.F. Regulation 9; cf. Status Agreement with the Congo, par. 32.

⁴ *G.A.O.R.*, 12 session, Annexes, A.i.65, pp. 2-3.

⁵ Secretary-General's Summary Study, pars. 36 and 38.

⁶ This term, used by the Secretariat, is here used in quotation marks because it does not adequately reflect the fact that the action is under the direction and responsibility of the United Nations and that the States as such are not legally engaged; cf. below, pp. 428-9.

⁷ United Nations Conference on the Law of the Sea, Official Records, vol. 4, p. 139.

⁸ U.N.E.F. Regulation 6; Status Agreement with Egypt, Introduction and par. 23.

⁹ U.N.E.F. Regulation 10; Status Agreement with Egypt, par. 23, and with the Congo, pars. 15-16.

¹⁰ U.N.E.F. Regulation 19; Status Agreement with Egypt, pars. 24-25, and with the Congo, par. 28.

¹¹ Below, (f), p. 387.

official acts, in Egypt under the Status Agreement with that country.¹ All members of the Force are entitled to the legal protection of the United Nations as agents of the Organization.²

The character of the Force and the division of functions and powers between the United Nations and the 'participating' States are, in most respects, defined in the U.N.E.F. Regulations, whose binding force for the national contingents was expressly recognized by the 'participating' States in paragraph 4 of their agreements with the United Nations, which reads:

'The Regulations referred to above affirm the international character of the Force as a subsidiary organ of the General Assembly and define the conditions of service for the members of the Force. National contingents provided for UNEF serve under these Regulations.'

The most relevant provisions of the Regulations themselves are as follows:

'CHAPTER II. INTERNATIONAL CHARACTER, UNIFORM, PRIVILEGES AND IMMUNITIES

6. *International character.* The United Nations Emergency Force is a subsidiary organ of the United Nations consisting of the United Nations Command established by General Assembly resolution 1000 (ES-I) of 5 November 1956 and all military personnel placed under the United Nations Command by Member States. The members of the Force, although remaining in their national service, are, during the period of their assignment to the Force, international personnel under the authority of the United Nations and subject to the instructions of the Commander through the chain of command. The functions of the Force are exclusively international and members of the Force shall discharge these functions and regulate their conduct with the interest of the United Nations only in view.

7. *Flag.* The Force is authorized to fly the United Nations flag in accordance with the United Nations Flag Code and Regulations. The United Nations Command shall display the United Nations flag and emblem on its Headquarters, posts, vehicles and otherwise as decided by the Commander. Other flags or pennants may be displayed only in exceptional cases and in accordance with conditions prescribed by the Commander.

8. *Uniform and insignia.* Members of the Force shall wear such uniform and distinctive insignia as the Commander, in consultation with the Secretary-General, shall prescribe. . . .

9. *Markings.* All means of transportation of the Force, including vehicles, vessels and aircraft, and all other equipment when specifically designated by the Commander shall bear a distinctive United Nations mark and licence.

10. *Privileges and Immunities.* The Force, as a subsidiary organ of the United Nations, enjoys the status, privileges and immunities of the Organisation provided in the Convention on the Privileges and Immunities of the United Nations. . . . The provisions of Article II of the Convention on the Privileges and Immunities of the United Nations shall also apply to the property, funds and assets of Participating States used in a Host State in connection with the national contingents serving in the Force.

¹ Pars. 7-38, see esp. pars. 11-12.

² U.N.E.F. Regulation 30; cf. below, pp. 423-7.

‘CHAPTER III. AUTHORITY OF THE COMMANDER OF THE UNITED NATIONS
EMERGENCY FORCE

11. *Command authority.* The Commander has full command authority over the Force. He is operationally responsible for the performance of all functions assigned to the Force by the United Nations, and for the deployment and assignment of troops placed at the disposal of the Force.

12. *Chain of Command and Delegation of Authority.* The Commander shall designate the chain of command for the Force, making use of the officers of the United Nations Command and the commanders of the national contingents made available by Participating Governments. He may delegate his authority through the chain of command. Changes in commanders of national contingents made available by Participating Governments shall be made in consultation between the Commander of the UNEF and the appropriate authorities of the Participating Government. The Commander of the UNEF may make such provisional emergency assignments as may be required. The Commander of the UNEF has full authority with respect to all assignments of members of the United Nations Command and, through the chain of command, of all members of the Force. Instructions from principal organs of the United Nations shall be channelled by the Secretary-General through the Commander and the chain of command designated by him.

13. *Good order and discipline.* The Commander of the UNEF shall have general responsibility for the good order of the Force. Responsibility for disciplinary action in national contingents provided for the Force rests with the commanders of the national contingents. Reports concerning disciplinary action shall be communicated to the Commander of the UNEF who may consult with the commander of the national contingent and if necessary the authorities of the Participating State concerned.

14. *Military police.* The Commander shall provide for military police for any camps, establishments or other premises which are occupied by the Force in a Host State and for such areas where the Force is deployed in the performance of its functions. Elsewhere military police of the Force may be employed, in so far as such employment is necessary to maintain discipline and order among members of the Force, subject to arrangements with the authorities of the Host State concerned, and in liaison with those authorities. For the purpose of this Regulation the military police of the Force shall have the power of arrest over members of the Force. Nothing in this Regulation is in derogation of the authority of arrest conferred upon members of a national contingent *vis-à-vis* one another.

‘CHAPTER IV. GENERAL ADMINISTRATIVE, EXECUTIVE AND
FINANCIAL ARRANGEMENTS

15. *Authority of the Secretary-General.* The Secretary-General of the United Nations shall have authority for all administrative, executive and financial matters affecting the Force and shall be responsible for the negotiation and conclusion of agreements with Governments concerning the Force. He shall make provisions for the settlement of claims arising with respect to the Force.

16. *Authority of the Commander.* The Commander shall have direct authority for the operation of the Force and for arrangements for the provision of facilities, supplies and auxiliary services. In the exercise of this authority he shall act in consultation with the Secretary-General. . . .

19. *Personnel*

(a) The Commander shall recruit from Member Governments officers for this

Command. Such officers are entitled to the privileges and immunities of article VI of the Convention on the Privileges and Immunities of the United Nations. The Commander shall be entitled to the privileges, immunities and facilities of sections 19 and 27 of the Convention on the Privileges and Immunities of the United Nations.

(b) The Commander shall arrange with the Secretary-General for such detailment of staff from the United Nations Secretariat to serve with the Force as may be necessary. Staff members of the United Nations detailed by the Secretary-General to serve with the Force shall be responsible to the Commander in the performance of their functions in accordance with the terms of their assignment by the Secretary-General. They remain subject to the Staff Regulations of the United Nations and to the authority of the Secretary-General and remain entitled to the privileges and immunities of articles V and VII of the Convention on the Privileges and Immunities of the United Nations.

(c) The Commander may recruit such local personnel as he requires. The terms and conditions of employment for locally recruited personnel shall be prescribed by the Commander and shall generally, to the extent practicable, follow the practice prevailing in the locality. They shall not be subject to or entitled to the benefits of the Staff Regulations of the United Nations, but shall be entitled to the immunity in respect of official acts provided in section 18 (a) of the Convention on the Privileges and Immunities of the United Nations. Disputes concerning the terms of employment and conditions of service of locally recruited personnel shall be settled by administrative procedure to be established by the Commander.

20. *Food, accommodations and amenities.* The Commander shall have charge of the billeting and the provision of food for all personnel attached to the Force. . . .

21. *Transportation.* The Commander shall arrange for the transportation of personnel and equipment to and from the area of operations. . . .

22. *Supplies.* The Commander shall be responsible for the procurement, storage and issuance of supplies required by the Force.

23. *Equipment.* The Commander shall make such arrangements as may be necessary for obtaining equipment required by the Force, other than the standard equipment expected to accompany national contingents.

25. *Maintenance and other services.* The Commander shall arrange for the necessary supporting units to provide maintenance repairs and other services required for the operation of the Force. . . .

28. *Public Information.* Public information activities of the Force and relations of the Force with the Press and other information media shall be the responsibility of the Commander acting in accordance with policy defined by the Secretary-General.

'CHAPTER V. RIGHTS AND DUTIES OF MEMBERS OF THE FORCE

30. *United Nations legal protection.* Members of the Force are entitled to the legal protection of the United Nations and shall be regarded as agents of the United Nations for the purpose of such protection.

31. *Instructions.* In the performance of their duties for the Force the members of the Force shall receive their instructions only from the Commander and the chain of command designated by him.

32. *Discretion and non-communication of information.* Members of the Force shall exercise the utmost discretion in regard to all matters relating to their duties and functions. They shall not communicate to any person any information known to them by reason of their position with the Force which has not been made public, except in the course of their duties or by authorization of the Commander. The obligations of

this Regulation do not cease upon the termination of their assignment with the Force.

34. *Jurisdiction.*

(a) Members of the Force shall be subject to the criminal jurisdiction of their respective national States in accordance with the laws and regulations of those States. . . .

(c) Members of the Force shall remain subject to the military rules and regulations of their respective national States without derogating from their responsibilities as members of the Force as defined in these Regulations and any rules made pursuant thereto.

(d) Disputes involving the Force and its members shall be settled in accordance with such procedures provided by the Secretary-General as may be required, including the establishment of a claims commission or commissions. . . .

35. *Customs duties and foreign exchange regulations.* Members of the Force shall comply with such arrangements regarding customs and foreign exchange regulations as may be made between the Host State concerned and the United Nations.

36. *Identity cards.* The Commander, under the authority of the Secretary-General, shall provide for the issuance and use of personal identity cards certifying that the bearer is a member of the United Nations Emergency Force. . . .

38. *Pay.* Responsibility for pay of members of the Force shall rest with their respective national State. . . .

39. *Overseas service allowance.* The Secretary-General shall fix a scale for a daily overseas service allowance not to exceed one U.S. dollar (\$1.00) a day to be paid by the United Nations. . . .

40. *Service incurred death, injury or illness.* In the event of death, injury or illness of a member of the Force attributable to service with the Force, the respective State from whose military services the member has come will be responsible for such benefits or compensation awards as may be payable under the laws and regulations applicable to service in the armed forces of that State. . . .

43. *Promotions.* Promotions in rank for members of the Force remain the responsibility of the Participating Government.¹

It follows from the Regulations that the Force, although composed of national contingents, is a genuine United Nations Force under the full control of the Organization as far as operational and external matters are concerned. The principal rights and functions retained by the Governments providing contingents (or officers for the U.N.E.F. Command) may be found in the following fields:

(a) *Recruitment and composition.* The recruitment of the individual members of national contingents is in the hands of the 'participating' Governments¹ which either place regular units of their army temporarily at the disposal of the United Nations or which recruit special volunteer units for service with the United Nations. However, the choice of the national units as such is in the hands of the United Nations, which thereby retains over-all authority for the composition of the Force. The Secretary-General and the Commander decide what States to ask for contingents and

¹ Except that the commanders of national contingents can only be replaced in consultation between the U.N.E.F. Commander and the 'participating' Government (U.N.E.F. Regulation 12, as expressly restated in par. 9 of the agreements with 'participating' States) and that the U.N.E.F. Commander may make provisional emergency assignments.

what offers to accept, and may, after adequate prior notification and consultation, request the withdrawal of a contingent already provided.¹ In so doing, they retain the necessary authority with regard to the size and overall composition of each contingent as well as with regard to achieving a balanced composition of the Force as a whole. In this way the United Nations has indeed been able to secure both an effective and a balanced Force, composed, on the one hand, of adequate numbers of regular patrolling units and of the various types of supporting units, and, on the other hand, of contingents from States in several regions of the world.²

Unlike the course followed in the case of Korea, the United Nations has deliberately excluded contingents and military staff officers from the permanent Member States of the Security Council³ and from States which, for geographical or other reasons, might have a special interest in the conflict.⁴ Under this formula it has been possible to avoid contingents and staff officers from States whose neutrality might be questioned by the parties to the dispute, without at any point conceding to the parties a right of veto which could detract from the exclusive authority of the United Nations to decide upon the composition and constitution of the Force.⁵

(b) *Withdrawal.* A 'participating' Government has the right to withdraw its contingent after adequate prior notification.⁶ This might provide it with an indirect way of exercising pressure upon the United Nations and the Commander in their decisions concerning the deployment of the contingent and the general operation of the Force. However, this danger is counterbalanced by the policy of the Secretary-General to avoid such differences in the size of national contingents as might lead to excessive dependence on any one State.⁷ Only a group of 'participating' States acting jointly are therefore in a position to exercise pressure. And any influence they might thus exert upon the operation of the Force is, of course, one of fact, not one of law. Only if the functions of the Force, as originally defined

¹ Agreements with 'participating' States, *U.N. Treaty Series*, vol. 271, par. 8.

² The Force included originally 4 (later 3) Scandinavian, 3 (later 2) American, 2 (later 1) Asiatic, and a Yugoslav, contingents, the Asiatic contingent being the largest and the Scandinavian contingents the smallest.

³ General Assembly Resolution 1000 (ES-I); Second and Final Report of the Secretary-General, par. 6, as approved by General Assembly Resolution 1001 (ES-I).

⁴ Secretary-General's Summary Study, pars. 16 and 44.

⁵ Second and Final Report of the Secretary-General, par. 6 i.f., as approved by General Assembly Resolution 1001 (ES-I); Secretary-General's Summary Study, pars. 16 and 161; *International Organisation*, 11 (1957), p. 423; *International Review Service*, 3 (1937), No. 33, p. 13.

⁶ Agreements with 'participating' States, *U.N. Treaty Series*, vol. 271, par. 8; cf. Secretary-General's Summary Study, par. 50.

⁷ Secretary-General's Summary Study, par. 17. On 31 July 1961 the largest national contingent (the Indian) numbered 1,251 men as compared to a total Force of 5,159. The other contingents numbered from 463 to 936 men (A/4857). Earlier figures may be found in *G.A.O.R.*, 12th session, Annexes, A.i.65, p. 2; *ibid.*, 13th session, Annexes A.i.65, p. 5; *ibid.*, 15th session, Annexes, A.i.27, p. 14.

by the General Assembly, should be altered in such a manner as to go beyond the understanding upon which the contingents were originally provided would the States providing the contingents have a legal right to intervene in that capacity, rather than through their membership of the General Assembly.¹

(c) *Command.* It has already been pointed out that the national contingents retain their identity and organizational unity and are commanded by their national officers. However, the commanding officers of the national contingents (the contingent commander or the commanders of units operating separately)² in turn take their orders from the Commander and through him from the Secretary-General and the General Assembly. The U.N.E.F. Regulations explicitly provide that 'in the performance of their duties for the Force the members of the Force shall receive their instructions only from the Commander and the chain of command designated by him',³ and that they shall discharge these duties and regulate their conduct with the interests of the United Nations only in view.⁴ The contingent commanders are free to communicate with their home Governments on all matters affecting their units.⁵ But this does not mean (any more than in Korea or under the proposals of the Military Staff Committee)⁶ that the Government can instruct the contingent commander in matters falling under the authority of the U.N.E.F. Commander as long as he does not overstep this authority or otherwise violate the understanding on the basis of which the contingent was provided.

(d) *Costs.* The members of national contingents receive a daily overseas service allowance from the United Nations. Otherwise they receive their regular pay and allowances—as well as compensation for service-incurred death, injury or illness—from their Government according to the national regulations.⁷ The 'participating' Governments also provide certain equipment—now in principle confined to the personal equipment of the soldiers together with small arms and ammunition. Other equipment is procured and paid for by the United Nations even if, in special cases, it has been requisitioned from the 'participating' Governments.⁸ The United Nations also pays all other costs of the Force, including food, quarters, welfare,

¹ Cf. Chaumont, in *Annuaire français de droit international* (1958), p. 434 and below, pp. 407-9.

² Cf. Secretary-General's Summary Study, par. 80.

³ The acceptance of this principle by the 'participating' Governments from the outset is evidenced by the declaration of the Norwegian Minister of Defence to the press that the Norwegian U.N.E.F. contingent is fully under the command of the United Nations and the U.N.E.F. Commander, and that the Norwegian Ministry of Defence is kept informed through the United Nations (*Arbeiderbladet*, Oslo, 21 November 1956).

⁴ U.N.E.F. Regulations 6, 11, 12, 16 and 31; cf. *G.A.O.R.*, 12th session, Annexes, A.i.65, p. 3.

⁵ Secretary-General's Summary Study, par. 79.

⁶ Above, pp. 365 and 372.

⁷ U.N.E.F. Regulations 38-40.

⁸ Report of the Secretary-General of 13 September 1960, A/4486, pars. 67-70 (*G.A.O.R.*, 15th session, Annexes, A.i.27) approved by the General Assembly Resolution 1575 (XV).

transportation, communications services, and use of the Royal Canadian Air Force planes composing the U.N.E.F. squadron.¹ In addition the United Nations reimburses the 'participating' Governments for 'all extra and extraordinary costs' which they are 'obliged to incur in making the forces available for UNEF service'.² Under this formula the 'participating' States receive reimbursement both for (all or all extra) pay and allowances paid to members of the contingent³ and for indemnities paid in respect of death, injury or illness as a result of service with U.N.E.F.,⁴ as well as for destruction, loss or depreciation of equipment supplied by them.⁵ The direct and reimbursement costs for the United Nations, totalling around \$20 million per year,⁶ are borne in part by voluntary contributions and in part by assessment of Member States.⁷ It may be said in conclusion that although the 'participating' States themselves had to carry part of the expenses during the first emergency period, the United Nations has since undertaken to pay or reimburse practically all the expenses of the Force. This means both that the United Nations has become financially independent of the 'participating' States and that it is easier to achieve a balanced geographical composition of the Force with contingents from prosperous as well as less prosperous countries.

(e) *Disciplinary action and criminal jurisdiction.* The members of the Force remain subject to their national military rules and regulations without derogating from their responsibilities as members of the Force. They are, furthermore, under the criminal jurisdiction of their Governments, even in respect of acts performed in their capacity as members of the Force.⁸ Disciplinary action in national contingents is therefore the responsibility of the contingent commander.⁹ To confer such authority upon

¹ For a more complete list, see the Secretary-General's Summary Study, loc. cit., p. 23; cf. the subsequent expansion in A/4486, cited in the preceding note.

² Report of the Secretary-General, *G.A.O.R.*, 12th session, Annexes, A.i.65, pp. 10-11, approved by General Assembly Resolution 1151 (XII).

³ The legal situation in this respect has not been clarified; see the Secretary-General's Summary Study, par. 118. No action has since been taken by the General Assembly.

⁴ *G.A.O.R.*, 12th session, Annexes, A.i.65, p. 11.

⁵ Report of the Secretary-General of 13 September 1960, A/4486, pars. 67-70 (*G.A.O.R.*, 15th session, Annexes, A.i.27, approved by General Assembly Resolution 1575 (XV)).

⁶ The 1961 budget totalled \$19 million, of which \$11,250,000 were for direct United Nations costs and \$7,750,000 for reimbursement to 'participating' Governments (General Assembly Resolution 1575 (XV), and *G.A.O.R.*, 15th session, Suppl. No. 5B). The 1962 budget was in the same order, \$1,625,000 *per month*, with a somewhat larger proportion going to reimbursement (A/4784, A/5065).

⁷ General Assembly Resolutions 1089 (XI); 1151 (XII); 1337 (XIII); 1441 (XIV); and 1575 (XV); cf. A/5056 (XVI).

⁸ U.N.E.F. Regulation 34 and Status Agreement with Egypt, par. 11, as confirmed in the agreements with 'participating' States, pars. 5 and 7.

⁹ U.N.E.F. Regulation 13; confirmed in the agreements with 'participating' States, pars. 6-7. By a Norwegian decree of 23 November 1956 the company commanders of the Norwegian contingent were given the disciplinary powers normally vested in battalion commanders. The Norwegian liaison officer was named the highest local disciplinary authority. Appeal can always be made to the Commander of the Norwegian Army (*Norsk Lovtidend, 2nen avd.*, 1956, p. 739).

the U.N.E.F. Commander would probably require specific legislation in most 'participating' States.¹ Each contingent also has the power to arrest its own members.² Despite all these powers vested in 'participating' Governments and contingent commanders *vis-à-vis* individual members of the Force, the U.N.E.F. Commander has general responsibility for the good order of the Force. He receives reports on disciplinary action and may consult with the contingent commander and the Government concerned.³ And the military police provided by him for the Force also has the power of arrest in so far as necessary to maintain order and discipline among members of the Force.⁴ Furthermore, the powers of national Governments and contingent commanders are confined to the criminal and disciplinary fields. As shall be explained in another context, any international or civil responsibility *vis-à-vis* third parties injured by the acts of the members of the Force is vested in the United Nations, not in the 'participating' Governments.⁵ Even if the injured State wishes to complain merely about failure to take disciplinary or criminal action, it must address itself to the United Nations—not to the 'participating' State.⁶

(f) *Status, privileges and immunities of members of national contingents.* It has already been pointed out that members of national contingents, unlike members of the U.N.E.F. staff, cannot claim privileges and immunities as United Nations officials or experts under the Convention on the Privileges and Immunities of the United Nations, but that they have been accorded, in the host country, rather similar privileges and immunities under the Status Agreement with Egypt. These include immunity in respect of official acts (par. 12 (a)) and complete immunity from criminal jurisdiction (par. 11). The inapplicability of the United Nations Convention in Egypt follows from an express provision in paragraph 25 of the Status Agreement.

Not even in other countries can members of national contingents claim privileges and immunities as officials or experts under the Convention on the Privileges and Immunities of the United Nations. This follows *a contrario* from the silence in this respect of U.N.E.F. Regulation 19, which must thus be assumed to limit the general provision for application of the Convention in Regulation 10, and from the fact that the United Nations has not designated the members of the national contingents as officials and included them in the relevant lists as prescribed in paragraph 17 of the Convention. This leaves only Article 105 of the Charter, which, in view of its terms, may be of doubtful value in respect of agents of the Organization who are neither officials of the Organization nor representatives of Member

¹ Secretary-General's Summary Study, par. 139.

² U.N.E.F. Regulation 14 i.f.

³ U.N.E.F. Regulation 13.

⁴ U.N.E.F. Regulation 14; cf. Status Agreement with Egypt, pars. 14 et seq., and with Congo, par. 12, both of which provide that the United Nations military police 'shall have the power of arrest over members of the Force' (S/5004).

⁵ Below, pp. 420-1

⁶ Below, pp. 414-15.

States.¹ Consequently, should the Force be stationed or otherwise have to perform official functions in other countries, arrangements for privileges and immunities, including immunity in respect of official acts, would have to be made, either by agreements with these countries, or by extension of the provisions of the Convention on the Privileges and Immunities of the United Nations to members of national contingents. This the Organization could probably do unilaterally, by action under paragraph 17 of the Convention and by an appropriate amendment to U.N.E.F. Regulation 19.²

However, in the 'participating' States most of the applicable privileges and immunities specified in §§ 18 and 22 of the Convention on the Privileges and Immunities of the United Nations would be out of harmony with the circumstances and Regulations referred to under (a)–(e) above.³ Although it might have been possible to grant members of national contingents immunity from *civil* suit in respect of official acts even in their home country,⁴ they could not be granted immunity from *criminal* jurisdiction in the country which has expressly undertaken to prosecute them.⁵ And there is no reason why they should enjoy exemption from taxation on the pay and emoluments which they receive from their home State according to its normal regulations, i.e. on a gross basis.⁶ Thirdly, the 'par-

¹ In fact the United Nations has claimed immunity from criminal jurisdiction for members of national contingents in third countries merely on the basis of U.N.E.F. Regulation 34 (a), which reserves such jurisdiction for their home States. This is hardly tenable, since United Nations regulations, in the absence of special authority, cannot impose obligations upon Member States (below, Chapter IV, §§ 3 (g), 4; cf. § 4 (b)), and since Article 105 of the Charter (like par. 18 of the Convention on Privileges and Immunities) normally could not cover unofficial acts.

² The International Law Association's Committee on the United Nations Charter submits that the injunction in Article 100 of the Charter, preventing members of the Secretariat from accepting instructions from authorities external to the Organization, would appear to preclude acceptance as part of the U.N. staff of 'national contingents on the UNEF pattern with its division of control between the United Nations and the contributing States over members of the Force' (International Law Association, *Report of the Forty-ninth Conference*, Hamburg, 1960, p. 144). However, U.N.E.F. Regulation 31 explicitly provides that 'in the performance of their duties for the Force the members of the Force shall receive their instructions only from the Commander and the chain of command designated by him'. And U.N.E.F. Regulation 6 provides that 'the members of the Force, although remaining in their national service, are, during the period of their assignment to the Force, international personnel under the authority of the United Nations'.

³ Cf. also U.N.E.F. Regulation 6 which provides that the members of the Force remain in their national service.

⁴ The procedures provided by the Secretary-General under U.N.E.F. Regulation 34 (d) for the settlement of such claims are presumably not intended to be exclusive; cf. Regulation 34 (b), which excludes the courts of the host State only. Cf. also Status Agreement with Egypt, pars. 12 and 38.

⁵ Agreements with 'participating' States (*U.N. Treaty Series*, vol. 271), pars. 5–7; cf. U.N.E.F. Regulation 34 and Status Agreement with Egypt, par. 11. The military members of the U.N.E.F. staff have been accorded immunity in respect of official acts and immunity from arrest even in their home countries under U.N.E.F. Regulation 19 (a); cf. the Convention on Privileges and Immunities of the United Nations, § 22 (a) and (b). The U.N. will have to waive this immunity if their home State is called upon to prosecute them, unless par. 34 is considered as a general waiver.

⁶ Above, under (d). Tax exemption and immunity in respect of official acts are granted in the host State; see Status Agreement with Egypt, pars. 10–12 and 26.

ticipating' State, of course, cannot accord to members of its national contingent immunity from the national service obligation pursuant to which most of them have been placed at the disposal of the United Nations. But, as pointed out under (b), the 'participating' States have undertaken not to withdraw their contingents without adequate prior notification. The other privileges and immunities listed in §§ 18 and 22 concern only the countries in which the officials perform their United Nations duties. And, unlike many other categories of international officials, members of U.N.E.F. national contingents will never be called upon to act in an international capacity in their home countries.

It will be seen that the legal powers retained by the 'participating' States in respect of their contingents relate to *personnel matters*. In this connexion it is useful to recall that under U.N.E.F. Regulation 6 'the members of the Force, although remaining in their national service, are, during the period of their assignment to the Force, international personnel under the authority of the United Nations'.

The major practical and legal implications of the first provision, that they remain in their national service, are that their Government is responsible for providing their uniforms and for all questions of promotion and in large measure pays and equips them, that it exercises disciplinary and criminal authority over them, and that it does not have to grant them privileges and immunities in these or in other respects.

The second provision, that they are *international* personnel during the period of their assignment to the Force, implies, on the one hand, that they have the *duties* of international personnel. They are, through their own national officers, subject to instructions only from the Commander in the performance of their duties for the Force. And they must discharge these duties with the interests of the United Nations, not those of their own Government, in view. They must exercise the utmost discretion in regard to all matters relating to their functions.¹ This duty, too, is one *vis-à-vis* the United Nations and in theory seems to apply even against their own Government. On the other hand, although their 'internal' *rights*, in respect of pay, uniform, promotion, &c., are mainly rights *vis-à-vis* their Government, not *vis-à-vis* the United Nations, they enjoy, as far as external rights are concerned, basically the status of international personnel. They are entitled to immunity in respect of official acts and to other privileges and immunities similar to those of United Nations officials and experts in the country where they perform their functions. And they are entitled to the legal protection of the United Nations as agents of the Organization.

¹ U.N.E.F. Regulation 32.

It will be noted that none of the legal powers retained by 'participating' States has any direct bearing upon the operation and functions of the Force within the mandate assigned to it by the General Assembly, or upon its relations to the parties to the conflict, to the host State, or to any other third parties. The command and operation of the Force and its external relations, including public information,¹ and the conclusion of agreements with other States providing contingents, with the parties to the dispute and the host Government,² as well as relations of members of national contingents when acting in their capacity of members of the Force, are clearly in the hands of the United Nations.

It may be said in conclusion that the United Nations, legally speaking, appears to have essentially the same operational and external powers in respect of U.N.E.F.,³ as long as it exists, as a national government has in respect of its national army. The United Nations itself cannot, however, expand U.N.E.F.'s functions beyond those originally assigned to it by the General Assembly with binding effect for 'the 'participating' (and host) States.

7. *The United Nations Force in the Congo*⁴

Shortly after the accession to independence of the Republic of the Congo on 30 June 1960, some units of the Congolese forces mutinied against their Belgian officers and committed acts of violence against members of the European population, in particular Belgians. The Belgian Government, acting against the wish of the Congolese Government, sent troops in order to maintain or restore order. This gave rise to bitterness and panic among the African population and to a new flight of Europeans and the consequent breakdown of many public services and important economic enterprises.⁵ In this situation the President and the Prime Minister of the Congo, by telegrams of 12 and 13 July 1960, requested the urgent dispatch of a United Nations Force composed of military units from neutral countries in order to protect Congolese territory against what they termed the Belgian 'act of aggression'.⁶

On 14 July the Security Council, at the request of the Secretary-General and without a dissenting vote, adopted a resolution calling upon Belgium to withdraw its troops and authorizing the Secretary-General

¹ U.N.E.F. Regulation 28.

² Below, p. 412.

³ See also below, pp. 406-11.

⁴ See Schachter, 'Legal Aspects of the United Nations Action in the Congo', *American Journal of International Law*, 55 (1961), pp. 1-28, dealing with the first 22 months of the operation of the Force. The present study takes into account activities during the first 1½ years of operation.

⁵ *S.C.O.R.*, 1960, 873rd meeting, p. 12; S/4531, par. 5, *ibid.*, Suppl. for July-September, p. 177.

⁶ S/4382, *ibid.*, p. 11.

'to take the necessary steps, in consultation with the Government of the Republic of the Congo, to provide the Government with such military assistance, as may be necessary, until, through the efforts of the Congolese Government with the technical assistance of the United Nations, the national security forces may be able, in the opinion of the Government, to meet fully their tasks.'¹

As to the *mandate* of the Force, the Secretary-General, in requesting this authority, pointed out that the difficulties which had developed in the Congo were connected with 'the maintenance of order in the country and the protection of life', and he expressed the understanding that if a United Nations Force was dispatched, Belgium would see its way to withdraw.² Some members of the Council spoke of the Belgian action as external aggression which the Security Council should take effective action to halt; others spoke of it in terms of a humanitarian intervention which must be continued until the United Nations Force could take over responsibility for internal security. The latter was also the thesis of the Belgian Government, which supported the dispatch of a United Nations force as proposed by the Secretary-General, and which declared itself willing to withdraw its forces when United Nations troops had arrived and were able to ensure the effective maintenance of order and the security of persons.³ Taking such different views of the nature of the Belgian intervention, the members of the Security Council disagreed as to the timing of the withdrawal of Belgian forces.⁴ However, the majority rejected an amendment calling for an *immediate* withdrawal,⁵ and the withdrawal ultimately took place only as and when United Nations troops entered the various areas.⁶

Later, in the Security Council's Resolution of 24 November 1961, the relevant policies and purposes of the United Nations with respect to the Congo were restated, on the basis of other resolutions adopted in the meantime,⁷ as follows:

'(a) To maintain the territorial integrity and the political independence of the Republic of the Congo;

'(b) To assist the Central Government of the Congo in the restoration and maintenance of law and order;

¹ S/4387. The vote was 8-0-3. China, France and the United Kingdom abstained because they could not support Belgian troop withdrawal before the United Nations Force had taken over; they did, however, support the dispatch of the United Nations Force (*S.C.O.R.*, 1960, 873rd meeting, pp. 25-44).

² *Ibid.*, pars. 195-6.

³ *Ibid.*, p. 41.

⁴ *Ibid.*, pars. 19 and 27.

⁵ *Ibid.*, pp. 43-44; cf. par. 224.

⁶ Cf. the Secretary-General's interpretation of the mandate in his first report, S/4389, *S.C.O.R.*, 1960, Suppl. for July-September, p. 17.

⁷ The successive development of the mandate, from the Secretary-General's initial statement to the Security Council on 13 July (*S.C.O.R.*, 1960, 873rd meeting, pp. 3-5) and his first report (S/4389, *ibid.*, Suppl. for July-September, p. 17), unanimously commended by Security Council Resolution of 22 July 1960, is reflected in General Assembly Resolution 1474 (ES-IV), pars. 2 and 6, Security Council Resolution of 21 February 1961, pars. 1-2, General Assembly Resolutions 1599 (XV), par. 2, and 1600 (XV), par. 3. Cf. also S//4531, pars. 7 and 20, *S.C.O.R.*, 1960, Suppl. for July-September, pp. 178 and 181.

'(c) To prevent the occurrence of civil war in the Congo;

'(d) To secure the immediate withdrawal and evacuation from the Congo of all foreign military, para-military and advisory personnel not under the United Nations Command, and all mercenaries.'¹

In the Status Agreement, which had been negotiated immediately before and which was signed three days later, the purposes of the Force were merely described in a general way as 'maintaining public order, peace and security'.²

Despite its greater size and heavier tasks, the United Nations Force in the Congo was constituted on a much more modest *formal basis* than the U.N.E.F. In view of the urgency of the matter and the difficulties involved in reaching agreement among its members, the Security Council did not lay down in its resolutions³ even the basic principles on which the Force should be organized, as the General Assembly had done in the case of U.N.E.F. The organization of the Force, including the appointment of its Supreme Commander, was thus left to the Secretary-General, who, however, made detailed reports to the Council. In September 1960, when the Security Council was unable to agree on what action to take after the split between President Kasa-Vubu and Prime Minister Lumumba, the matter was referred to the General Assembly under the Uniting for Peace Resolution.⁴ However, the resolutions of the General Assembly did not concern themselves directly with the Force, except for the budgetary aspects.⁵

A basic agreement with the host country, on the lines of and pushing somewhat further than the 'Aide-Mémoire on the Basis for the Presence and Functioning of the UNEF in Egypt',⁶ was concluded two weeks after the decision to establish the Force.⁷ However, a detailed Status Agreement between the United Nations and the Congo, partly modelled upon the U.N.E.F. Status Agreement,⁸ but covering also the civilian operations, was not concluded until 27 November 1961, although with effect from the date of arrival of the first elements of the United Nations Force in the Congo.⁹ Regulations for the Force had not yet been finalized at the time of writing. Arrangements with the States providing contingents were made by correspondence rather than by formal agreements.

¹ S/5002.

² S/5004, par. 43 (a).

³ Resolutions of 14 July, 22 July, 9 August and 17 September 1960 and of 21 February and 24 November 1961 (S/4387, S/4405, S/4426, S/4526, S/4741, S/5002).

⁴ Security Council Resolution of 17 September 1960, S/4526.

⁵ Resolutions 1583 (XV), 1590 (XV), 1595 (XV), 1619 (XV) and 1633 (XVI); see also Resolutions 1474 (ES-IV), 1599 (XV) and 1600 (XV) on certain operational matters. The other resolutions on the Congo (Resolutions 1498, 1592 and 1601) have no bearing on the Force.

⁶ G.A.O.R., 11th session, Annexes, A.I.66, p. 9.

⁷ S/4389/Add.5, 29 July 1960, S.C.O.R., 1960, Suppl. for July-September, p. 27.

⁸ U.N. Treaty Series, vol. 260, p. 61.

⁹ A/4986, S/5004. The agreement of 17 April 1961 between the United Nations and the President of the Republic of the Congo on the implementation of the Security Council Resolution of 21 February 1961 does not contain any provision specifically concerning the Force.

In the absence of new resolutions, agreements and regulations, the Secretary-General and the Force have relied greatly upon the precedents set by the basic documents of the U.N.E.F. and have organized the Force in essentially the same manner. In his oral introduction requesting authority to establish the Force, the Secretary-General stated that if the authority was given, he would base his actions on his Summary Study of the experience derived from the establishment and operation of the U.N.E.F.¹ And in his first report on the implementation of the Security Council Resolution of 14 July 1960 he characterized his prior oral introduction, in response to which the first resolution had been adopted, 'as a basic document on the interpretation of the mandate', and went on to restate and supplement the major principles expressed in the U.N.E.F. Regulations and in the Summary Study as they were to be applied to the Congo Force.² His report was unanimously 'commended' by the Security Council in its Resolution of 22 July 1960,³ and has since been used as a basic guide for the organization of the Force and the interpretation of its mandate.

In this report it is re-emphasized that the United Nations must reserve for itself the authority to decide on the composition of the Force, while avoiding elements from the permanent members of the Security Council⁴ or from other States whose participation might give rise to complications, and taking into account, without being bound by, objections from the host State.⁵ These principles were later formulated in the Status Agreement in the following terms:

'The United Nations shall possess sole competence with respect to decisions concerning the composition of the military units sent to the Congo, it being understood at the same time that the United Nations shall in determining their composition, give every consideration to the opinion of the Government as one of the most important factors to be borne in mind in connexion with recruitment.'⁶

In addition to equipped national contingents of field troops and supporting units,⁷ the Force comprises a Supreme Commander with a general staff made up of officers seconded directly by member Governments or transferred from U.N.E.F. and U.N.T.S.O.⁸ with the consent of the

¹ *S.C.O.R.*, 1960, 873rd meeting, par. 28; cf. pars. 175-6 and *ibid.*, 885th meeting, par. 65. See the Summary Study in *G.A.O.R.*, 13th session, Annexes, A.i.65, pp. 8 et seq., the relevant contents of which have been related above, pp. 376 et seq.

² S/4389, *S.C.O.R.*, 1960, Suppl. for July-September, pp. 17 et seq.

³ S/4405.

⁴ As in the case of U.N.E.F., these did, however, provide transportation and other services.

⁵ *S.C.O.R.*, 1960, 873rd meeting, pars. 28, 89 and 147; cf. *ibid.*, Suppl. for July-September, p. 18, cf. above, p. 384. The Secretary-General did not give effect to Congolese criticism of the employment of contingents from non-African States.

⁶ S/4986, par. 2. Cf. below, pp. 407-8, with citations, on attempts made to interfere with the exclusive responsibility of the United Nations in this respect.

⁷ Field troops are provided by a number of African States and by certain States in Asia and Europe. Technical supporting units and services, including airlift of contingents and equipment, are also provided by other States, notably north American and western and eastern European.

⁸ Above, p. 354, n. 3.

respective Governments, as well as other international and locally recruited personnel. It should be noted that the United Nations operations in the Congo (Organisation des Nations Unies au Congo—O.N.U.C.)—in contradistinction to U.N.E.F.—also include an important Civilian Operation, and that the head of the whole United Nations Operation is not the Commander of the Force but a political officer, the Special Representative of the Secretary-General. The Chief of the Civilian Operations is in rank and authority opposite number to the Supreme Commander, and also exercises the functions of Resident Representative of the Technical Assistance Board.¹ They are both subject to the authority of the Special Representative. The total strength of the Force ranged between 15,000 and 20,000 officers and men.² O.N.U.C. itself also includes several hundred international and locally recruited personnel. The Force is equipped with a considerable number of motor vehicles and aircraft. These have been purchased or chartered by the United Nations or lent by various Member States for operation at United Nations expense. At Headquarters the Secretary-General has, as in the case of U.N.E.F., an advisory committee of representatives of States providing contingents,³ as well as military advisers seconded by Member States.⁴

The *costs* of the Force are covered by the United Nations in essentially the same manner as those of U.N.E.F. In 1961 the expenses of O.N.U.C. averaged approximately \$10 million per month, of which about 83 per cent. were for direct expenses and about 17 per cent were for reimbursement to the Governments providing contingents.⁵ The budget for 1962 was of the same order.⁶ These sums are assessed upon Member States after deduction for voluntary contributions and for waiver of reimbursement by States providing airlift services. The General Assembly has expressly decided that the expenses are 'expenses of the Organization' subject to legally binding assessment of Member States under Article 17 of the Charter,⁷ but that they shall nevertheless be kept separate as being essentially different in nature from the expenses under the regular budget.⁸

It is pointed out in the first report of the Secretary-General on the

¹ S/4417/Add. 5; S.C.O.R., 1960, Suppl. for July–September, p. 60.

² The first units arrived within 48 hours of the Security Council decision to set up the Force. Within ten days the Force had risen to 8,000 officers and men. In September 1960 the Force totalled 19,341 and was composed of twenty-four national contingents ranging from 1 to 3,267 officers and men (*ibid.*, p. 202). Towards the end of 1961 the Force totalled about 16,000 officers and men.

³ *Ibid.*, 887th meeting, par. 36.

⁴ The above and other information on the organization of the Force may be found in the first report (*ibid.*, Suppl. for July–September, pp. 17 et seq.), and in the annual budgets for the United Nations Operations in the Congo.

⁵ G.A.O.R., 15 session, Annexes, A.i.49–50.

⁶ A/5066.

⁷ General Assembly Resolution 1583 (XV). This legal question was submitted to the International Court of Justice for an advisory opinion by General Assembly Resolution 1731 (XVI), reproduced in *I.C.J. Reports*, 1961, p. 64.

⁸ General Assembly Resolution 1619 (XV), cf. A/5066.

implementation of the Security Council Resolution of 14 July 1960 that 'in accordance with the principles generally applied by the Organisation . . . the Force is necessarily under the exclusive *command* of the United Nations, vested in the Secretary-General under the control of the Security Council', a statement which has since been repeated in several communications to Congolese authorities¹ and to the Security Council.² The report reiterates, furthermore, that to all United Nations personnel used in the operations, 'the basic rules of the United Nations for international service should be considered as applicable, particularly as regards full loyalty to the aims of the Organisation and to abstention from actions in relation to their country of origin which might deprive the operation of its international character and create a situation of dual loyalty'. Accordingly, it has been pointed out that both the military and civilian personnel of the Force in the Congo are governed by the following two basic principles of international service:³

'1. The prohibition against seeking or accepting instructions of their governments with respect to their duties in the United Nations Force [United Nations Charter, Article 100].

'2. The obligation to refrain from any activity incompatible with the proper discharge of their duties and particularly to avoid any act or pronouncement which may adversely reflect on their international status or on the independence and impartiality required by that status [United Nations Staff Regulation 1. 4].'

When the Secretary-General on one occasion complained to the President of one contributing Member State about the lack of protection offered to the United Nations personnel by an officer of its contingent, the President replied by referring to the fact that the officers had been restricted in their freedom of action by orders from the United Nations Command, and that if the latter were dissatisfied with the officer's action, he was under their command and they should tell him so.⁴

In the basic agreement with the United Nations, the Government of the Congo stated that it 'will ensure the freedom of movement of the Force in the interior of the country and will accord the requisite *privileges and immunities* to all personnel associated with the activities of the Force'.⁵ Unfortunately, at times when relations between the United Nations and the Congolese Government were strained, several incidents took place where Congolese military units physically interfered with United Nations personnel or otherwise did not act in accordance with these undertakings.

¹ Second report, S/4417, S.C.O.R., 1960, Suppl. for July–September, p. 45, and the documents cited below, pp. 407–8, in connexion with attempts by Governments to interfere with the exclusive command authority of the United Nations.

² Ibid., 885th meeting, par. 127, and 887th meeting, pars. 45–46.

³ Schachter, in *American Journal of International Law*, 55 (1961), p. 11.

⁴ S.C.O.R., 1960, Suppl. for July–September, pp. 99–102.

⁵ S/4389/Add. 5, *ibid.*, p. 28. Italics supplied.

The violations gave rise to protests from, and counteraction by, the United Nations¹ and, in some cases, to expressions of regret by the Congolese authorities.² The privileges and immunities in the Congo were later set forth in detail in the Status Agreement of 27 November 1961³ on the same lines as provided for U.N.E.F. in the Status Agreement with Egypt. Like the latter, the Status Agreement with the Congo provides, on the one hand, that 'members of the Force shall be subject to the exclusive jurisdiction of their respective national States in respect of any criminal offences which may be committed by them in the Congo' (par. 9), and, on the other hand, that 'the Supreme Commander of the United Nations Force in the Congo shall take all appropriate measures to ensure the discipline and good order of members of the Force' and that the United Nations military police 'shall have the power of arrest over members of the Force' (par. 12). The Status Agreement also provides, like that of U.N.E.F., for use of the United Nations flag (par. 26) and for distinctive United Nations identification marks on vehicles, aircraft and vessels of the Force (par. 32).

As the examples quoted above and the relevant provisions of the Status Agreement indicate, the *distribution of functions and powers* between the United Nations and the States providing contingents to the Congo Force is the same as in the case of U.N.E.F. The legal powers of the States providing contingents are confined to personnel matters, while all operational decisions are made by the United Nations, or by officers of national contingents acting under the instructions of the United Nations Command, which in turn is subject to the orders of the Secretary-General and, through him, of the Security Council and the General Assembly.⁴

While the organization of and the distribution of powers over the United Nations Force in the Congo are very similar to those of U.N.E.F., the *functions and operations* of the Congo Force have turned out rather differently. U.N.E.F., during the second phase of its operations, has had only one main task, that of patrolling the demarcation line and the international frontier. This it has been able to do without any serious incidents involving military operations.⁵

The Congo Force has had to perform a number of tasks throughout a vast territory in order to fulfil its mandate to assist in the maintenance of law

¹ See, for example, second report, S/4477/Add. 8, *ibid.*, p. 77; *ibid.*, 916th meeting, p. 2; and S/4753, *ibid.*, 1961, Suppl. for January-March.

² *Ibid.*, 1960, 888th meeting, p. 19.

³ S/4986; see notably pars. 9 et seq.

⁴ See below, pp. 407-9, on the implementation and consequences of this principle.

⁵ From August 1960 to July 1961 there were seven incidents involving firing on the U.N.E.F. troops, nine other incidents involving firing, 109 crossings of the demarcation line not involving firing, and 242 air violations of the line. In general, there was 'no resort to force by U.N.E.F., the mere presence of armed personnel on the spot being adequate to prevent incidents. On one occasion, however, when an armed infiltrator fired at a patrol in order to resist apprehension, United Nations troops had to take appropriate action in self-defence' (Report of the Secretary-General, 30 August 1961, A/4857, pars. 1 and 15).

and order and the protection of life and property, to prevent foreign intervention in the form of men, arms or military supplies, and to prevent civil war. Apart from a number of civilian activities, like maintenance of essential services, mediation and persuasion, the Force has performed, *inter alia*, the following functions: patrolling areas threatened by disorders;¹ establishing and guarding United Nations protected areas where people in danger of arbitrary arrest or other persecution can take refuge;² guarding and defending the residences of Congolese political leaders and diplomatic representatives of foreign States³ to protect them against arbitrary arrest or violence;⁴ guarding government buildings;⁵ guarding, isolating and neutralizing the meeting place of the Congolese Parliament and ensuring the free passage through the Congo of its members;⁶ guarding, and in emergencies, temporarily closing, ports and airfields to secure the supplies to and the movements of the United Nations Force and to prevent Congolese troop movements or external aid to the opposing sides in the civil war;⁷ arrest and eviction of foreign military personnel or mercenaries;⁸ disarming civilians⁹ and military groups which have broken loose from their commanders.¹⁰ Last, but not least, the functions have included occupying, patrolling and if necessary defending areas threatened by armed invasion, and establishing, guarding and defending road blocks¹¹ or neutral zones between opposing Congolese forces,¹² or removing road blocks or other obstacles and opposition to the United Nations movements and operations created by local military units;¹³ guarding and defending United Nations personnel and positions.¹⁴

These and other activities could not avoid interfering with the plans of the various authorities in the Congo—indeed, it was in many cases their

¹ S/4557, pars. 67 et seq., *S.C.O.R.*, 1960, Suppl. for October–December, p. 22.

² S/4590, *ibid.*, p. 94; S/4745, *ibid.*, 1961, Suppl. for January–March; S/4750/Add. 6–7, *ibid.*; S/4757, *ibid.*

³ *G.A.O.R.*, 15th session, Annexes, A.i.85, pp. 35–36.

⁴ S/4557, pars. 66 et seq., *S.C.O.R.*, 1960, Suppl. for October–December, p. 22; *G.A.O.R.*, 15th session, Annexes, A.i.85, pp. 41 et seq.; S/4571, par. 2, *S.C.O.R.*, 1960, Suppl. for October–December, p. 67; *G.A.O.R.*, 15th session, Annexes, A.i.85, p. 27; S/4757, *S.C.O.R.*, 1961, Suppl. for January–March.

⁵ S/4571, par. 2, *S.C.O.R.*, 1960, Suppl. for October–December, p. 67, cf. General Assembly Resolution 1600 (XV), par. 5.

⁶ S/4841, esp. Annex III, pars. 6–8; S/4913, Annex II; S/4917; cf. S/4865, S/4908, S/4911 and Add. 2, all in *S.C.O.R.*, 1961, Suppl. for July–September.

⁷ S/4531, par. 20, *S.C.O.R.*, 1960, Suppl. for July–September, p. 181; cf. *ibid.*, pp. 16 seq.

⁸ S/4557, pars. 73–74, *ibid.*, Suppl. for October–December, p. 24; *G.A.O.R.*, 15th session, Annexes, A.i.85, pp. 103–6 and 108; S/4807, pars. 2 and 8; S/4940.

⁹ S/4557/Add. 6, *S.C.O.R.*, 1961, Suppl. for January–March.

¹⁰ *Ibid.*, 1960, 901st meeting, p. 17; cf. Status Agreement, S/4986, par. 13.

¹¹ See, for example, S/4750/Add. 4 and 6, *S.C.O.R.*, 1961, Suppl. for January–March.

¹² S/4557, pars. 74 and 79, *ibid.*, 1960, Suppl. for October–December, pp. 24–25; S/4750/Add. 7, *ibid.*, 1961, Suppl. for January–March; A/4733, *G.A.O.R.*, 15th session, Annexes, A.i.85, pp. 107 et seq.

¹³ S/4940, and Add. 16, pars. 22–27.

¹⁴ *G.A.O.R.*, 15th session, Annexes, A.i.85, p. 61.

purpose to restrict the freedom of action of these authorities in so far as they might upset order and security. However, the various Congolese authorities also had armed forces at their disposal, and they were not at all times willing to acquiesce in the United Nations interference. It was thus unavoidable that tension and armed clashes would occur during periods when the aims of the various Congolese leaders and those of the United Nations diverged. And when the United Nations, pursuant to the Security Council's resolutions of 21 February and 24 November 1961, took active measures to arrest and expel foreign military personnel and mercenaries, this provoked attacks by Katangese forces which involved the United Nations in military operations on a larger scale.¹

The numerous incidents of warfare which occurred between United Nations forces and Congolese forces (notably those of the Central Government² and of the Katanga authorities) involved the use not only of small arms, but also of artillery, fighter planes, heavy armoured cars and river boats, as well as bombing from the air.³ There were considerable numbers of killed and wounded, and prisoners and equipment taken on both sides.⁴ In some cases the United Nations troops, in other cases the other side, were forced to withdraw from ports, road blocks and other positions they had been holding.⁵ In some cases the hostilities were ended by signed agreements for cessation of hostilities and withdrawal from positions held.⁶

The military encounters were, however, merely local operations, which did not involve the entire armies of the United Nations and the Congolese authorities concerned. Public threats of countrywide military assault against the United Nations Force⁷ and proclamations by the Katanga authorities of a state of 'war' with the United Nations⁸ were never given full effect. Nor did the battles last long. Prisoners were usually returned to their units immediately or after a certain period of confinement. Exceptions to this were foreign military personnel and mercenaries captured by the United Nations troops. These were detained, questioned and sent out of the country

¹ S/4940, Adds. 1-17, *S.C.O.R.*, 1961, Suppls. for July-September and October-December.

² This term is used for the Government in Leopoldville headed by President Kasa-Vubu, recognized by General Assembly Resolution 1498 (XV).

³ S/4758/Add. 2, *S.C.O.R.*, 1961, Suppl. for January-March; *G.A.O.R.*, 15th session, Annexes, A.i.85, p. 108; S/4940/Add. 2, par. 5; Add. 7; Add. 16, par. 12; Add. 17, pars. 2-4 and 12; S/5025, pp. 6 and 11.

⁴ See, *inter alia*, S/4761, *S.C.O.R.*, 1961, Suppl. for January-March; *G.A.O.R.*, 15th session, Annexes A.i.85, pp. 36, 53, 61 and 108; S/4940; S/4940/Add. 7 and Add. 16, par. 27.

⁵ See notably on the fights in Banana and Matadi in March 1961, S/4761, *S.C.O.R.*, 1961, Suppl. for January-March, and in Elizabethville in August-December 1961, S/4940 and Adds. 1-17.

⁶ S/4761, *S.C.O.R.*, 1961, Suppl. for January-March; S/4940/Add. 7 and Add. 11; cf. below, pp. 412-13.

⁷ S/4557, pars. 13 and 23, *S.C.O.R.*, 1960, Suppl. for October-December, pp. 10 and 13.

⁸ S/4750, par. 11, *ibid.*, 1961, Suppl. for January-March.

in implementation of Security Council and General Assembly decisions in that respect.¹

Like U.N.E.F., the United Nations Force in the Congo was not intended to carry out active military operations.² Its original instructions in respect of use of arms were like those of U.N.E.F., that

'... men engaged in the operation may never take the initiative in the use of armed force, but are entitled to respond with force to an attack with arms, including attempts to use force to make them withdraw from positions which they occupy under orders from the Commander, acting under the authority of the Security Council and within the scope of its resolution'.³

When the threat of a full-scale civil war between the rival Governments in the various provinces became imminent after the murder of Prime Minister Lumumba, the Security Council, by a resolution of 21 February 1961, urged 'that the United Nations take immediately all appropriate measures to prevent the occurrence of civil war in the Congo, including arrangements for cease-fires, the halting of all military operations, the prevention of clashes, and the use of force, if necessary, in the last resort'.⁴ This resolution—which for the first time in history authorized troops under United Nations command to use force if necessary to carry out the decisions of the Security Council—cleared the way for an active United Nations opposition to the civil war under way. However, it was in the execution of another task assigned to it by the same resolution, that of taking measures for the withdrawal of foreign personnel, that the Force got involved in military operations on a larger scale. The Force did not consider that it had the legal authority, on the basis of the resolution of 21 February 1961, to use force for the evacuation of foreign personnel. Instead, it found the legal authority in a request from the Central Government to assist in the execution of its Ordinance of 24 August 1961 to this

¹ Security Council Resolution of 21 February 1961, A2, and General Assembly Resolution 1599 (XV), par. 2. See citations above, p. 397, n. 8.

² In the instructions to Dr. Bunche for his mission to Katanga, in August 1960, the Secretary-General said that the aims of the Security Council should be 'speedily achieved, but without frictions ... which would compromise the impartial attitude and pacific status of a United Nations Force' (S/4417, par. 8, cf. also par. 10, *S.C.O.R.*, 1960, Suppl. for July–September, pp. 51–53).

³ First report, S/4389, *ibid.*, p. 20, cf. Secretary-General's Summary Study of U.N.E.F., *G.A.O.R.*, 13th session, Annexes A.i.65, p. 17; second report, S/4417, pars. 6 and 8–10, *S.C.O.R.*, 1960, Suppl. for July–September, pp. 48–52. Cf. *ibid.*, 885th meeting, par. 128. For a restrictive interpretation by the Special Representative of the Secretary-General in the Congo, see *ibid.*, 888th meeting, p. 19. On the extension of the authority to use arms by General Assembly Resolution 1474 (ES-IV) of 20 September 1960, considered in the light of statements in the Assembly, see Schachter, in *American Journal of International Law*, 55 (1961), p. 20.

⁴ S/4741. At an earlier stage, the Secretary-General had transmitted to the Central Government and the Katanga authorities an interpretation of the Security Council Resolution of 9 August 1960 to the effect that the United Nations had no right to refuse either Government 'to take any action which by their own means, in accordance with the Purposes and Principles of the Charter, they can carry through' in relation to the other Government (S/4417/Add. 6, *S.C.O.R.*, 1960, Suppl. for July–September, p. 64).

effect.¹ Later, the authority was specified in the Security Council's Resolution of 24 November 1961 where the Council:

'4. *Authorizes* the Secretary-General to take vigorous action, including the use of the requisite measure of force, if necessary, for the immediate apprehension, detention pending legal action and/or deportation of all foreign military and para-military personnel and political advisers not under the United Nations Command, and mercenaries as laid down in paragraph A-2 of the Security Council resolution of 21 February 1961;

'5. *Further requests* the Secretary-General to take all necessary measures to prevent the entry or return of such elements under whatever guise and also of arms, equipment or other material in support of such activities.'²

The Status Agreement of 27 November 1961 provided that 'the United Nations shall not have recourse to the use of force except as a last resort and subject to the restrictions imposed by its mandate and by the resolutions of the Security Council and the General Assembly'.³

In most cases of armed clash which occurred, the Congolese forces opened fire first, except that the United Nations forces may have fired first in answer to a mass charge from the Congolese side.⁴ The Force did not engage in offensive operations, even after the Security Council Resolution of 21 February 1961. It maintained this line, even when the Central Government and certain States providing contingents set the Secretary-General under intense pressure, employing notes, incidents, threats and appeals to the Security Council, to make the Force enter the province of Katanga despite the threats of the Katanga authorities to resist such entry with force.⁵ Similarly, the Force rejected demands from the Central Government and from provincial governments, accompanied by ultimata, threats or other kinds of pressure, that it liberate Prime Minister Lumumba,⁶ that it expel from Luluabourg invading forces of the Stanleyville Government,⁷ or that it evict the troops which, upon the seizure of power by the Congolese Chief of Staff, had occupied airports and public buildings.⁸

However, the defensive policy has not been pressed to the point where the Force could not act to re-establish its own positions and freedoms when these had been temporarily overthrown by larger contingents of Congolese troops. Thus, when an Austrian medical team had been arrested by Congolese troops, United Nations troops interfered and liberated them

¹ S/4940, pars. 1-2 and Annex.

² S/5002.

³ S/5004, par. 43 (b).

⁴ A/4587, par. 14, *G.A.O.R.*, 15th session, Annexes, A.i.85, p. 35. See also below, p. 401.

⁵ Second report, S/4417, and Adds. 1 and 7. *S.C.O.R.*, 1960, Suppl. for July-September, pp. 54-71. See *ibid.*, 885th meeting, esp. par. 128. In the end the United Nations succeeded in taking up its positions in Katanga without resorting to force. This impelled the withdrawal of the last regular Belgian forces from the Congo.

⁶ S/4590, with text of United Nations protest against ultimative form, *ibid.*, Suppl. for October-December, p. 95.

⁷ S/4750/Add. 3, *ibid.*, 1961, Suppl. for January-March.

⁸ S/4557, par. 17, *ibid.*, 1960, Suppl. for October-December, p. 17.

after a battle resulting in casualties to both sides.¹ Similarly, when Katanga gendarmes blocked the runway at the Elizabethville airport, they were disarmed and transported to their headquarters by United Nations troops.² When the United Nations garrison in Banana had been forced by shelling and superior numbers of Congolese troops to give up this naval base, reinforcements were sent up with instructions to reoccupy the base, but it was not specified whether they should do so by the use of force.³

At a later stage, in the execution of its mandate under the Security Council Resolutions of 21 February and 24 November 1961 to evacuate foreign military personnel, political advisers and mercenaries, the United Nations Force took important preventive measures, including the placing of surveillance on Radio Katanga, on gendarmerie headquarters and on other key points and installations in the City of Elizabethville.⁴ It was primarily attacks upon the positions thus taken up which caused the hostilities on a larger scale in Elizabethville in August–December 1961 and which later forced the United Nations to take preventive offensive action in several respects, such as bombardments from the air of railway lines, bridges, airports, artillery positions, ammunition dumps and military trucks, disarming Katangese gendarmerie and clearing defended roadblocks, inflicting heavy casualties upon the Katangese forces.⁵ This provoked strong protests to the United Nations from certain Member Governments, which spoke of ‘war operations conducted by the UN in Katanga’.⁶

In accordance with its mandate the United Nations Force has maintained neutrality in internal conflicts,⁷ confining its efforts to the prevention of offensive civil war operations, through persuasion, mediation, neutral zones or, if necessary, armed resistance.⁸ During the period when more than one authority claimed to represent the constitutional Central Government these efforts were directed at either side. However, after the establishment in August 1961 of a new constitutional Central Government, recognized as such by the United Nations,⁹ the Organization adopted the line that

¹ *Ibid.*, pp. 104–6.

² S/4791, par. 25.

³ S/4758/Add. 2, *S.C.O.R.*, 1961, Suppl. for January–March; and S/4761, *ibid.* The carrying out of the plans was prevented by the subsequent larger attack upon and forced withdrawal from Matadi, which was reoccupied only much later by unarmed Nigerian police.

⁴ S/4940, pars. 3 and 15.

⁵ S/4940, pars. 15–17, S/4940–Add. 2 and, notably, Add. 16, pars. 22–27, and Add. 17.

⁶ Telegrams to the United Nations from the Republic of the Congo (Brazzaville) and from Belgium, December 1961, S/5035 and S/5025.

⁷ Security Council Resolution of 9 August 1960, par. 4 (S/4426), repeating earlier statements in the Secretary-General’s Summary Study on U.N.E.F., and in his first report on the Force in the Congo (S/4389); S/4791, par. 25, *S.C.O.R.*, 1961, Suppl. for April–June. Cf. the citations below, p. 444, n. 3.

⁸ See, for example, S/4750, pars. 8–10, *S.C.O.R.*, 1961, Suppl. for January–March.

⁹ In his letter of 13 August 1961 to the Prime Minister, the Secretary-General confirmed that the United Nations would deal with his Government as being the Central Government of the Republic of the Congo and agreed that ‘whatever aid and support the United Nations is in a

no military action would be directed against any offensive police operation undertaken by that Government.¹

A neutral attitude has not been called for when foreign activities were involved. Thus the United Nations Force itself has taken the initiative in detaining aircraft with crew bringing arms and military supplies into the Congo,² and in arresting and evicting foreign mercenaries and advisers. The United Nations also took a special interest when on New Year's Day 1961 Congolese troops from the Central Government invaded the Kivu Province from the Belgian trusteeship territory of Ruanda-Urundi, across the international frontier, although the United Nations Force confined itself to attempting to contact the invaders and the Belgian authorities with a view to obtaining a cease-fire, while not interfering with any defence action by the local Congolese troops.³

8. *A Permanent United Nations Force*⁴

Members of the United Nations have always been prepared to support the establishment of a United Nations Force in emergency situations when they felt that such a force was called for and knew what its tasks would be. But they have not been disposed to support the establishment of a permanent force. The General Assembly did not, for example, accept the

position to give to the Congo, within the limits of this mandate, should be rendered exclusively to your Government' (S/4923).

¹ Confirmed in press statements by several United Nations officials in September 1961. In his report on the Protocol of 13 October 1961 of agreement between the Katanga authorities and O.N.U.C. subsequent to the cease-fire of 20 September 1961, the Officer-in-charge of the United Nations Operation in the Congo states that 'the freedom of action of the Central Government, representing the sovereign and constitutional authority of the Republic of the Congo, is of course unaffected'. In approving the Protocol, United Nations Headquarters set, *inter alia*, the following conditions: (a) The conclusion of the agreement shall in no way affect the resolutions of the Security Council, including that of 21 February 1961, and of the General Assembly; (b) The agreement is of a strictly military nature and applies solely to the United Nations Force in Katanga and to the armed forces of Katanga'. The Protocol provided, on the other hand, in par. 10, that 'the representatives of O.N.U.C. shall not consider that the cease-fire has been violated in the event that the Katangese gendarmerie counters an attack from the outside' (S/4940/Add. 11, pars. 9-10 and 12 and Annex II). In its Resolution of 24 November 1961 (S/5002) the Security Council:

'8. Declares that all secessionist activities against the Republic of the Congo are contrary to the *Loi fondamentale* and Security Council decisions and specifically demands that such activities which are now taking place in Katanga shall cease forthwith;

9. Declares full and firm support for the Central Government of the Congo, and the determination to assist that Government in accordance with the decisions of the United Nations to maintain law and order and national integrity, to provide technical assistance and to implement those decisions.'

² S/4789, S.C.O.R., 1961, Suppl. for April-June, citing Security Council Resolution of 21 February 1961.

³ S/4606, Annex 4, *ibid.*, Suppl. for January-March.

⁴ This problem is being studied by the United Nations Charter Committee of the International Law Association, see *Report of the Forty-eighth Conference* (New York, 1958), pp. xiv and 507 et seq., esp. pp. 519 and 549, and *Report of the Forty-ninth Conference* (Hamburg, 1960), pp. 98 et seq., esp. pp. 126 et seq. Other studies undertaken are listed in footnote 1 to the Committee's Report to the Forty-ninth Conference, *ibid.*, p. 131.

Secretary-General's proposals for an individually recruited United Nations Guard in 1948 and for a United Nations Legion in 1952.¹ And both the Collective Measures Committee and, later, the Secretary-General have expressed the view that a standing United Nations Force would not be necessary or practical.² Instead, they have made proposals for stand-by arrangements under which it would be possible, by drawing upon national contingents earmarked and prepared in advance, to organize an *ad hoc* force adapted to the circumstances of each particular case as it might arise.

The Collective Measures Committee, on the basis of the Uniting for Peace Resolution and having in mind a combat force to resist aggression, recommended in 1951-2 a force on the Korean pattern organized and directed by one or more Member States.³ The Secretary-General in 1958 submitted to the General Assembly a Summary Study of the experience derived from the establishment and operation of U.N.E.F.⁴ as a 'guidance for any future efforts looking towards the establishment or use of international United Nations instruments serving purposes of the kind met by UNEF'.⁵ This study was not concerned with operations requiring combat activity.⁶ It proposed flexible stand-by arrangements for a force on the U.N.E.F. pattern, organized and directed by the United Nations. This scheme was further supplemented to some extent by the Secretary-General in the introductions to his later annual reports on the basis of the Congo experience.⁷

Neither of these proposals was passed upon by the General Assembly.⁸ The military proposals of the Uniting for Peace Resolution and of the Collective Measures Committee have not been applied since Korea.⁹ The conclusions contained in the Secretary-General's Summary Study on U.N.E.F., on the other hand, were relied upon when another non-combat

¹ Above, p. 353.

² Second Report of the Collective Measures Committee, *G.A.O.R.*, 7th session, Suppl. No. 17, p. 12; Secretary-General's Summary Study of U.N.E.F., *ibid.*, 13th session, Annexes, A.i.65, pars. 152-4, cf. par. 123; Introduction to the *Annual Report of the Secretary-General*, 1959-60, pp. 3-4 (after Congo).

³ Above, pp. 372-3.

⁴ *G.A.O.R.*, 13th session, Annexes, A.i.65, pp. 8-33.

⁵ *Ibid.*, par. 3; cf. par. 154. The aims were further elaborated by the Secretary-General in his oral introduction of the Summary Study, see *ibid.*, Special Political Committee, 100th meeting, pp. 63-64, and see *Annual Report of the Secretary-General*, 1958-9, p. 10.

⁶ Secretary-General's Summary Study, *G.A.O.R.*, 13th session, Annexes, A.i.65, par. 178.

⁷ *Ibid.*, 15th session, Suppl. No. 1A, pp. 3-4.

⁸ Above, p. 373; *G.A.O.R.*, 13th session, Annexes A.i.65, p. 34. In his oral introduction of the Summary Study on 5 November 1958 the Secretary-General indicated that there was no real need for the Assembly to take action at the time; *ibid.*, Special Political Committee, p. 64.

⁹ At that time some, but far from all, Members of the United Nations indicated that they might maintain within their national armed forces elements prepared for service as United Nations units in accordance with par. 8 of the Uniting for Peace resolution (*G.A.O.R.*, 6th session, Suppl. No. 13, p. 37, and 7th session, Suppl. No. 17, p. 21). However, these indications were not followed by any concrete action, and the Scandinavian initiatives in 1960-1 related below were for a police force rather than for a combat force.

force was established in the Congo two years later¹ despite the fact that this force got involved in more active and military operations than U.N.E.F. Soon afterwards, the Scandinavian States, on their own initiative, took steps to give effect to the Secretary-General's proposals for stand-by arrangements by preparing contingents or technical personnel for United Nations service upon call.²

It remains to be seen whether the conclusions of the Summary Study will also be extended, *mutatis mutandis*, to a genuine combat force, if such a force should ever have to be established, or whether the United Nations in such a case will revert to a force of the Korean type as proposed by the Collective Measures Committee or whether the two proposals can be married. (The constitutional question whether such a force could be placed under United Nations command is discussed in Chapter IV, below.) An indication of a proposal for such a marriage may be seen in the final statement on the British Commonwealth Prime Ministers' Conference issued in London on 17 March 1961. The relevant passage reads:

'At the appropriate stage, a substantial and adequately armed military force should be established, to prevent aggression and enforce observance of the disarmament agreement; and an international authority should be created, in association with the United Nations, to control this force and to ensure that it is not used for any purpose inconsistent with the Charter.'³

Later, both the Soviet Union and the United States have included proposals for a United Nations Force in the drafts of a disarmament treaty which they submitted to the United Nations Conference on Disarmament in Geneva early in 1962.

CHAPTER III

INTERNATIONAL REPRESENTATION OF AND RESPONSIBILITY FOR THE FORCE

1. General

Who is internationally responsible for an international force? The State in whose territory it performs its functions or whom it assists? The States providing contingents? The Organization? Or its several Member States?

¹ *S.C.O.R.*, 1960, 873rd meeting, par. 28; cf. pars. 175-6. Earlier, on 13 October 1957, the Security Council had rejected a Pakistani proposal to deploy U.N.E.F. in Kashmir.

² See, for Sweden, Royal Proposition No. 145 of 7 April 1961, *Bihang till Riksdagens protokoll* 1961, 1, *saml.* No. 145, and, for Norway, *Forhandlingar i Stortinget*, 1960/61, No. 70, pp. 559-61.

³ Par. 3 (f) of the final statement, *The Times*, 18 March 1961. The principle of an international police force to replace the national armed forces was adopted one month earlier at the East-West Conference in Warsaw on 3-6 February 1961 (Report by Finn Moe, *Arbeiderbladet*, Oslo, 13 February 1961).

It has at once to be made clear that *Member States* as such have no legal responsibility *vis-à-vis* third parties for the acts of the Organization, whether on the international law or on the municipal law plane. The United Nations as an Organization has a juridical and an international personality of its own,¹ distinct from that of its individual Member States. It concludes treaties, convenes conferences, appoints representatives and performs other international acts in its own name, not on behalf of its several Member States. It cannot reasonably be maintained that all Member States would become parties to the treaties concluded by the Organization or would otherwise become externally liable for the acts of the Organization, be it in their capacity as Member States or in their capacity as members of the deliberative organ which might have decided upon the act.² This would require a clear delegation of powers, which the Charter does not contain,³ quite apart from the fact that this would turn the United Nations into something like a federation, which was never intended. Similarly, the members do not acquire any rights by the acts of the Organization unless these are addressed to them or constitute *pacta in favorem tertii*. This applies to the acts of any organ of the Organization when acting as such. It must apply also to the acts of an international force if it is established and operated by the Organization and not by its Member States acting outside the deliberative organs of the Organization.

As will be more fully explained below, *the State in whose territory the force operates* and/or which it assists has no jurisdiction over and no other direct legal powers with respect to the force. The rights and duties of the host State are defined in international agreements with the United Nations and are in the nature of international rights and duties *vis-à-vis* this Organization as another subject of international law.

The only persons who could be seriously envisaged as bearing international rights and duties in respect of the force are thus the Organization as such and *the 'participating' States*. If the force is recruited individually by the United Nations, there are no 'participating' States, and there can be no question that the United Nations has the sole international representation and responsibility. Doubt arises only when the force is composed of

¹ *Reparation for Injuries Suffered in the Service of the United Nations*, I.C.J. Reports, 1949, p. 179; see also below, Chapter IV, § 3 (f), esp. p. 457.

² The latter possibility may have been in the minds of certain members of the Security Council during the discussion of the proposed Free Territory of Trieste reported below, pp. 451-2 (S.C.O.R., 1947, No. 1, p. 7), although the words used in the discussion do not necessarily go beyond the scope of internal obligations.

³ Even the somewhat misleading provision in Article 24. 1, that the Members of the United Nations agree that the Security Council 'acts on their behalf in carrying out its responsibility for the maintenance of international peace and security', cannot be given this wide interpretation. If this phrase has any legal significance at all, it can only be construed as a reference to the power of the Security Council (like that of any other principal organ), within its field of competence, to bind the *organization* externally, or to the *internally* binding effect of its decision under Article 25 and Chapters VI-VIII.

national contingents, whose members are concurrently members of the armed forces of 'participating' States. The discussion which follows will be chiefly concerned with the three forces established by the United Nations on the basis of national contingents and will aim primarily at establishing the distribution of international competences between the United Nations and the States providing these contingents. After summarizing the position with regard to operational control as discussed in detail above, it will be appropriate to consider in turn the practice in the three forces with respect to international agreements and to passive and active responsibility before drawing general conclusions.

2. Operational control

(a) It has been pointed out above¹ that the supreme power of decision in all operational and external matters relating to *U.N.E.F.* was vested in the United Nations, and that the legal powers retained by the States providing contingents are confined to internal (personnel) matters of no direct concern to the parties to the dispute or to any other third parties. The Commander of the Force is appointed by the United Nations, takes his orders only from its organs and acts exclusively in its name. He is responsible to the Organization and independent of the policies and control of any one nation. His, and through him the United Nations', operational command authority is not altered by the fact that each national contingent is under the direct command of its own national officers, since these take their orders in all operational matters relating to the Force, not from their national Government, but from the *U.N.E.F.* Commander.

It is even clearer from the basic documents and practice of *U.N.E.F.* mentioned above² that the host State has no legal powers of direction over the Force which operates on its territory. It can present requests to the Commander or the Secretary-General, or it can make proposals in the deliberative organs of the Organization, but it can in no circumstances give any direct orders to the Force. The host State can, of course, insist upon compliance by the Force with the conditions laid down in the agreements concluded between the United Nations and the host State, but none of these conditions is of a nature to place the Force under the operational control of the host State.³

¹ pp. 376-90.

² pp. 375 et seq.

³ On the question whether the host State has a unilateral right to demand the withdrawal of the Force, see the basic agreement with Egypt of November 1956 (*G.A.O.R.*, Annexes, A.i.66, p. 9); Sohn, *American Journal of International Law*, 52 (1958), pp. 239-40, citing the Egyptian statement in *G.A.O.R.*, 11th session, 597th plenary meeting, 27 November 1956, p. 348; Security Council Resolution of 14 July 1960; the basic agreement with the Congo, *S.C.O.R.*, 1960, Suppl. for July-September, p. 27; the subsequent resolutions of the Security Council amending the mandate; and Prime Minister Adoula's speech of 2 August 1961, S/4923, Annex, p. 6.

It has been pointed out above¹ that the *United Nations Force in the Congo* is organized in essentially the same manner as U.N.E.F. and that here too command authority in operational matters is vested exclusively in the Supreme Commander appointed by and acting under the orders of the United Nations. Indeed, the basic relationship between the United Nations and the States providing contingents is the same in the Congo as in U.N.E.F. The relationship to the host State has a somewhat different basis in so far as the United Nations Force is in the Congo to assist the Government in the maintenance of internal order, in addition to its task of preventing foreign intervention. (The close co-operation was well illustrated when on 24 August 1961 the Central Government enacted an *Ordonnance* providing for the expulsion of all non-Congolese officers and mercenaries serving in the Katangese forces, and requested United Nations assistance in the execution of this *Ordonnance*, a request which coincided with the United Nations own mandate and which was promptly complied with.)² However, the Secretary-General in his first report on the implementation of the Security Council resolution authorizing him to establish the Force made it clear that this would not affect the exclusive command authority of the United Nations. He stated that although the Force

'may be considered as serving as an arm of the Government for the maintenance of order and protection of life—tasks which naturally belong to the national authorities and which will pass to such authorities as soon as, in the view of the Government, they are sufficiently firmly established—the Force is necessarily under the exclusive command of the United Nations, vested in the Secretary-General under the control of the Security Council. This is in accordance with the principles generally applied by the Organisation. The Force is thus not under the orders of the Government nor can it, as I pointed out in my statement to the Council, be permitted to become a party to any internal conflict. A departure from this principle would seriously endanger the impartiality of the United Nations and of the operation.'³

The Status Agreement provides:

'The United Nations shall be as an international Force and as such its responsibilities shall be exercised for the purposes of maintaining public order, peace and security; in so doing it shall not apply domestic regulations and procedures, but shall act in accordance with its interpretation of the mission assigned to it by the Security Council.'⁴

On some occasions the host Government and certain Governments providing contingents demanded that the United Nations Force in the Congo take a certain course of action and suggested or even demanded that certain contingents be employed for this purpose. In a few cases such demands were accompanied by threats to withdraw contingents from United Nations

¹ pp. 393–6.

² S/4940, par. 2, and Annex I.

³ S/4389, *S.C.O.R.*, 1960, Suppl. for July–September, p. 18. This principle was reaffirmed by the representative of Ecuador, *ibid.*, 886th meeting, par. 40.

⁴ S/5004, par. 43 (a).

command and place them under the direct authority of the Congolese Government. All these demands were rejected by the Secretary-General, who in polite terms pointed out that it was for the competent organs of the United Nations to decide what actions the Force was to take and which contingents were to be employed for them.¹

In his first report on the Congo Force, which was unanimously commended by the Security Council, the Secretary-General stated:

'The authority granted to the United Nations Force cannot be exercised within the Congo either in competition with representatives of the host Government or in co-operation with them in any joint operation. This naturally applies *a fortiori* to representatives and military units of other Governments than the host Government. Thus, *the United Nations operation must be separate and distinct from activities by any national authorities.*'²

Although this statement, like the similar statements made earlier in respect of U.N.E.F.,³ may at the time have been aimed primarily at the Congolese and Belgian Governments, the Secretary-General later quoted it to the Security Council in reference to news that a national contingent wanted 'to pull out from the Force until the United Nations "ceases its flagrant interference in internal Congolese affairs"'. And on this occasion the Secretary-General added:

'Were a national contingent to leave the United Nations Force, they would have to be regarded as foreign troops introduced into the Congo, and the Security Council would have to consider their continued presence in the Congo, as well as its consequences for the United Nations operation, in this light.'⁴

Some Governments did at a certain time withdraw their contingents from the Force because of their dissatisfaction with the manner in which the Force was being deployed. But these contingents were withdrawn completely from the Congo. Had they been left in the country to act independently of the United Nations this would indeed have defeated one of the main purposes of the United Nations action, viz. to prevent intervention by foreign States.

It may be said both in respect of U.N.E.F. and the United Nations Force in the Congo that, legally, the States providing contingents can influence

¹ Second report, S/4417, par. 7 and Adds. 1, 2 and 7 (S.C.O.R., 1960, Suppl. for July–September, pp. 45 et seq.); *ibid.*, 888th meeting, pars. 32 and 109; 889th meeting, pars. 46 and 51; 896th meeting, p. 20; S/4531, par. 26 (*ibid.*, Suppl. for July–September, p. 183); S/4557, par. 17 (*ibid.*, Suppl. for October–December, p. 11). See also S/4809 and S/4811, *ibid.*, 1961 Suppl. for April–June. See, on the other hand, the statement made in the Indian Parliament by Prime Minister Nehru who, according to press reports, when suggesting that the Indian contingent be deployed in Katanga, took care to emphasize that the contingent would act in accordance with the decisions of the United Nations (*Arbeiderbladet*, Oslo, 25 March 1961).

² S/4389, par. 12, S.C.O.R., 1960, Suppl. for July–September, p. 19 (italics supplied), restated orally, *ibid.*, 887th meeting, pars. 45–46.

³ See, for example, the Secretary-General's Summary Study, par. 165, G.A.O.R., 13th session, Annexes, A.I.65, p. 29.

⁴ S.C.O.R., 1960, 896th meeting, p. 20.

the operational (and external) decisions of the United Nations only through their regular participation in the deliberations and voting of the General Assembly and the Security Council in the same way as other Member States; or, in the case of some of them, as members elected by the General Assembly to the Advisory Committee. Any additional *factual* influence which they might be in a position to exercise through their contingents, notably by threatening to withdraw them, is weakened by the fact that they make no significant financial contributions in their capacity as 'participating' States,¹ and that the contingents are not large enough to make the United Nations dependent upon any single 'participating' State.²

The situation with regard to operational control will probably be the same in respect of a *force established by the Security Council under the procedure laid down in Articles 43 et seq.* of the United Nations Charter. As pointed out above, these articles appear to envisage supreme United Nations command authority over the force³ in operational matters, and the reports of the Military Staff Committee also point in this direction.⁴

Ross,⁵ on the basis of an interpretation of the second sentence of Article 42 of the Charter, maintains that despite any delegation of command to the United Nations from the contributing Governments by the terms of the special agreements, 'the command is and will remain national in the last instance, as surely as a breach of this obligation can only entail international effects for the state and does not affect the national duty of obedience. The individual soldier will be liable to punishment only for failing to obey his national superiors.'

It is certainly true that the members of national contingents may be subject only to their own national military code and jurisdiction, as indeed is the case under the articles elaborated by the Military Staff Committee, and also in the case of U.N.E.F. and of the United Nations Force in the Congo. However, even though any disciplinary or criminal sanctions must be inflicted by the national authorities, this does not mean that such sanctions will not be inflicted for failure to obey a United Nations Commander. On the contrary, the contributing States must instruct their contingents to obey any orders from the United Nations Command, and must punish them if they fail to do so. At the very least the (national) commander

¹ Above, pp. 385-6, cf. p. 394. The major financial contributions outside the regular assessments are made by other Member States in other forms, notably by those great powers which provide air transportation and waive their claims for reimbursement. Thus the U.S., the U.S.S.R., Canada and the U.K. alone waived reimbursement for air transport facilities which amounted to about \$13,000,000 in the second half of 1960; *G.A.O.R.*, 15th session, Annexes, A.1.49/50, p. 11.

² Above, p. 384.

³ In this sense also Kelsen, *The Law of the United Nations*, pp. 765-8, and the rapporteur of Committee III/3 of the San Francisco Conference, cited by him.

⁴ Above, pp. 359-62, cf. notably Articles 44 and 47 (1) and (3) of the Charter.

⁵ *Constitution of the United Nations* (Copenhagen, 1950), pp. 151-2.

of the national contingent must take direct orders from the United Nations Command and pass them on to the subordinate members of his contingent. But in the course of battle situations will clearly arise where it becomes necessary for the United Nations Command—whether this be one single command or separate commands for each region or for each service—to issue orders directly to smaller units detached from the main force of the national contingent or to separate services of the contingent. Even during the United Nations police operations in the Middle East and the Congo, it has been necessary to establish chains of command on these lines.¹ Indeed, in principle probably all the members of the force must be subject to United Nations orders, as was provided in the agreements concluded between the United States and the other States contributing forces to the United Nations action in Korea.² In these circumstances it would not be entirely fitting to say that command is 'national'. Indeed, it is only in respect of sanctions that the jurisdiction is clearly national. The 'substantive' (legislative and administrative) jurisdiction in operational matters—and this is the most important—is vested in the Organization. And this is not purely an international law jurisdiction—over States—as is usually the case when a State confers upon an international organization the power to make binding decisions. It is a jurisdiction exercised directly over the State organs concerned, which have for the time being and for the specific purpose become an organ of the United Nations.³ This is going further than the usual case where a State undertakes to comply with the decisions of an international organization on the understanding that it will itself take all necessary measures to have the decision executed by its competent organs. To sum up, the States contributing contingents have ceded, not only the power to make decisions binding upon themselves as States, but the power to exercise direct legislative and administrative jurisdiction over the contingents in operational matters.

Whatever view one takes of the terminological question as to whether or not command can be said to be 'national', it can hardly be maintained that operational control, for the purpose of determining the international responsibility, is vested in the States providing contingents, if these States have placed their contingents under the direct command of a commander appointed by the Organization and exclusively subject to its orders, and especially if integrated. This must be so even if sanctions for disobedience of United Nations orders can be applied only under national law and by national authorities.

¹ Cf. the deployment tables annexed to the second progress report to the Secretary-General from his Special Representative in the Congo, *S.C.O.R.*, 1960, Suppl. for October–December, p. 40, and on U.N.E.F., above, p. 378, cf. p. 385; and *G.A.O.R.*, 12th session, Annexes, A.i.65, p. 3.

² Above, p. 365.

³ This is clearly reflected in the U.N.E.F. Regulations; see esp. pars. 6, 11–12, and 29–33.

It should be added, moreover, that the system envisaged by the Military Staff Committee is not the only system which is permissible under the Charter. There is nothing in the Charter to prevent the 'air, sea or land forces of Members of the United Nations'¹ from being subjected to a common, United Nations military code and discipline.² It was no doubt not the words of the Charter, but practical and political considerations, including the desire to avoid amending the relevant statutes of the States providing contingents which caused the Military Staff Committee to propose that these matters should remain a national responsibility, as they are, for the same reasons, in the cases of U.N.E.F. and the Congo. Indeed, it would be stretching the words of Article 42 and the intention of their drafters too far to attempt to deduce from them any restrictions upon the right of the Security Council (and the States providing contingents) to adopt such procedures of command and jurisdiction as may be found effective and legally and politically acceptable to the Member States concerned.

What has been stated above concerning U.N.E.F. and the United Nations Force in the Congo applies *a fortiori* to any civilian or military force enlisted individually by the Organization.³ The States providing individual officers for truce observation groups are, of course, even less in a position to exercise operational control than are States providing more or less self-contained contingents. And if the members of the force are recruited directly by the United Nations as private individuals, as in the United Nations Guard, then they are not in any way national officials, but are entirely in the same position as civilian international officials.

(b) In the case of *Korea*, on the other hand, the United Nations had no direct command authority. This, as already pointed out, was vested in the United States as the 'Unified Command'. Although the United States had been designated as such by the Security Council, and although it reported to the United Nations, it did not take operational orders from the United Nations. The Organization confined itself to making recommendations on major policy matters, and although the Unified Command in fact gave effect to these recommendations, it was not legally bound to do so.⁴

The Uniting for Peace Resolution does not go into the question of who is to control the Force. However, the Collective Measures Committee, as already pointed out in Chapter II, § 5, proposed a system similar to that adopted in *Korea*, implying that operational control would be exclusively

¹ These are the terms of Article 42, upon which Ross bases his interpretation that 'the command must, according to the definition, be national'.

² Such a code was envisaged, ultimately, by Article 79 of the abortive Treaty Constituting the European Defence Community of 27 May 1952; cf. Articles 18 et seq. of the Jurisdictional Protocol, and the Military Penal Protocol of the same date.

³ Above, Chapter I, pp. 352-6.

⁴ Above, Chapter II, § 4, pp. 363-70.

vested in a Member State or a group of Member States acting as 'executive military authority'. However, this proposal was not approved by the General Assembly. And even if it had been, it would not be binding upon any future session of the General Assembly. The question whether the Charter imposes any limitations upon the right of the Assembly and the Security Council to adopt whatever system of command they prefer is discussed below, in Chapter IV, § 4 (c) (pp. 462-8).

It will be recalled that the position was similar in respect of military sanctions under the Covenant of *the League of Nations*.¹

3. *International Agreements*²

(a) U.N.E.F. Regulation 15 provides that the Secretary-General of the United Nations 'shall be responsible for the negotiation and conclusion of agreements with Governments concerning the Force'.³ Indeed, all agreements relating to *U.N.E.F. and the United Nations Force in the Congo* have been concluded on behalf of the United Nations by the Secretary-General or under his authority by the Commander or the Commander's representative, in essentially the same manner as any other agreements concluded by the United Nations. The agreements with the States providing contingents⁴ and those with the host State⁵ were concluded by the Secretary-General. The more formal agreements expressly designated themselves as agreements between the United Nations and the State concerned and were registered *ex officio* by the United Nations as provided for treaties to which the United Nations is a party.⁶ Agreements of a technical nature providing for the entry of U.N.E.F. into the area to be evacuated by the Anglo-French and Israeli forces in the Middle East were concluded with the Commanders of these forces by the U.N.E.F. Commander on instructions from the Secretary-General.⁷ Armistice agreements were also concluded by or on behalf of the United Nations both with the Central Government and with provincial authorities. Thus a 'provisional draft agreement on the cease-fire between the United Nations troops and those of the Katanga authorities' of 20 September 1961 and an implementing 'protocol of agreement between the Katanga authorities and ONUC subsequent to the cease-fire' of 13 October 1961 were signed by 'President

¹ Above, pp. 356-7; cf. below, pp. 434-5.

² On the relationship to the Hague and Geneva Conventions on warfare see below, Chapter V.

³ Cf. also Regulation 35, which provides that 'members of the Force shall comply with such arrangements regarding customs and foreign exchange regulations as may be made between the Host State concerned and the United Nations'.

⁴ *U.N. Treaty Series*, vol. 271 (U.N.E.F.).

⁵ *Ibid.*, vol. 260, p. 61; *G.A.O.R.*, 11th session, Annexes, A.i.66, p. 9 (U.N.E.F.); S/4389/Add. 5, *S.C.O.R.*, 1960, Suppl. for July-September, p. 27; S/4809, Annexes I-II; S/5004 (Congo).

⁶ Regulations for the registration and publication of treaties, Article 4. 1 (a), *U.N. Treaty Series*, vol. 1, p. xxii.

⁷ Cf. *G.A.O.R.*, 11th session, Annexes, A.i.66, pp. 29 and 43, and plenary meetings, pp. 1300-1.

Tshombe, on behalf of the Katanga Government' and Mr. Mahmoud Khiari, on behalf of the United Nations, and entered into force upon subsequent approval by the United Nations Headquarters.¹ The legal situation was less clear when, earlier, on 5 March 1961, an agreement for the cessation of hostilities in the port of Matadi was concluded between 'Minister Delvaux, representing the Prime Minister and the Minister of the Interior of the Government of the Republic of the Congo, and the Sudanese captain, S. A. Hafiz, in charge of the United Nations troops at Matadi, in the presence of Major Clement Bouffard, representing the United Nations, and Kiembe, the Chief of Staff of the Congolese National Army'. The agreement provided for the withdrawal of 'the Sudanese troops' to Leopoldville and those who signed undertook to report to the Congolese Government and 'to the United Nations at Leopoldville' respectively, on the precise circumstances of the incidents. Whereas the two Congolese representatives signed the agreement 'for the Congolese Government', the United Nations Commander merely signed 'S. A. Hafiz, Sudanese captain'. In addition, Major Bouffard, who was a United Nations Liaison Officer and did not belong to the local garrison, signed as witness for the United Nations. One should probably not attach too great importance one way or the other to the form used by a local military commander under the pressure of battle conditions. However, a substantive reason for the forms of signature may be found in the fact that the United Nations Liaison Officer advised (but did not order) the local United Nations Commander not to agree to withdraw from Matadi, and that the Congolese representatives as a consequence forbade the former to act as interpreter.² Whatever the reason may have been, the text of the agreement refers twice to the United Nations and nowhere to the Sudanese Government (except for the title under the signature). There can thus be no doubt that the Sudanese captain was in fact concluding the agreement on behalf of the United Nations, under whose operational orders he stood, and not on behalf of the Sudanese Government, which would have had no right to give him instructions in the matter.

The fact that the agreements have been concluded by the Secretary-General or his representative in the name of the United Nations or its organ and not in the name of the States providing contingents, means that only the United Nations is a party to the agreements and bearer of the rights and duties arising from them. Consequently, only the United Nations can claim fulfilment of the treaty obligations from the other contracting party. Indeed, it is the United Nations, not the States providing contingents, which has presented the demands to the host State that it fulfil its treaty

¹ S/4940/Add. 7 and 11.

² S/4761, with text of agreement in Annex II, *S.C.O.R.*, 1961, Suppl. for January-March.

obligations and which has protested when these obligations have been violated, as they were on certain occasions in the Congo.¹

It must be for the United Nations to present any claims to the host State even in respect of paragraph 23 of the U.N.E.F. Status Agreement with Egypt, which provides that the immunity, inviolability and exemptions laid down for United Nations assets in Article II of the Convention on the Privileges and Immunities of the United Nations 'shall also apply to the property, funds and assets of Participating States used in Egypt in connection with the national contingents'.² Similarly, it must be for the United Nations to present any claims on the basis of those provisions of the Status Agreement which grant privileges and immunities to the members of national contingents.³ The 'participating' States have treaty relations only with the United Nations. It is true that the basic agreement between the United Nations and the 'participating' States refers to the Status Agreement, which is annexed to the basic agreement. This fact probably gives the 'participating' States a right *vis-à-vis* the United Nations to claim that the Organization maintains and enforces such privileges and immunities as the Status Agreement accords to the 'participating' States and their personnel. However, the 'participating' States have no direct right *vis-à-vis* the host State, if this State and the United Nations did not intend by the Status Agreement to confer such direct right upon the 'participating' States (*pacta in favorem tertii*). It is hardly possible to deduce any such intent merely from the terms of the Status Agreement,⁴ and if there was no such intent, one cannot admit that the United Nations could, by its subsequent agreements with the 'participating' States, unilaterally extend the scope of the host State's obligation by giving these States a direct right against it.

On the other hand, the host State cannot claim directly from the 'participating' States performance of the obligations undertaken by them in their agreements with the United Nations, e.g. to exercise jurisdiction with respect to any crime or offence which might be committed by members of their contingents. The agreements with the States 'participating' in the U.N.E.F.⁵ expressly refer to paragraph 11 of the Status Agreement with Egypt, under which 'members of the Force shall be subject to the exclusive

¹ See, for example, second report, S/4417/Add. 8, Annex II, *S.C.O.R.*, 1960, Suppl. for July-September, pp. 78 et seq., cf. *ibid.*, 888th meeting, pars. 91-92; and *ibid.*, 916th meeting, par. 7.

² *U.N. Treaty Series*, vol. 260, p. 61.

³ Cf. below, pp. 423-7, on the general legal protection of the members of the Force.

⁴ Cf. also the provision in the U.N.E.F. Status Agreement with Egypt, par. 10, and with the Congo, par. 11, that the arrangements respecting criminal and civil jurisdiction are made having regard to the interests or special functions of the United Nations, and not for the personal benefit of the members of the Force. In practice, *pacta in favorem tertii* have been recognized only in exceptional circumstances; see Rousseau, *Principes généraux du droit international public* (Paris, 1944), vol. 1, pars. 295-301.

⁵ Par. 5, *U.N. Treaty Series*, vol. 271, p. 38; cf. above, pp. 386-7.

jurisdiction of their respective national States in respect of any criminal offences which may be committed by them in Egypt'. The agreements with 'participating' States add, moreover, that 'this immunity from the jurisdiction of Egypt is based on the understanding that the authorities of the participating States would exercise such jurisdiction as might be necessary with respect to crimes or offences committed in Egypt by any members of the Force provided from their own military services. It is assumed that the participating States will act accordingly.' However, the actual undertaking to exercise criminal jurisdiction, as contained in paragraph 7 of the agreements with the 'participating' States hardly intended, by a *pactum in favorem tertii*, to establish a direct and irrevocable right for the host State to demand prosecution of members of national contingents. The host State must therefore address its demand to the United Nations, based on the Status Agreement, and leave it for the United Nations to present a demand to the 'participating' States, based on its agreements with them.

(b) The international agreements entered into in connexion with the United Nations action in *Korea*, on the other hand, were concluded, not by the Secretary-General acting for the United Nations, but by the United States Government or the United Nations Command.

The four registered agreements with Member States providing armed forces or field hospitals were concluded by 'the Government of the United States of America (the executive agent of the United Nations Forces in Korea)'.¹ Of the agreements with the Republic of Korea, one—'regarding expenditure by forces under command of the Commanding General, Armed Forces of the Member States of the United Nations'—was concluded by 'the Government of the United States',² and another—'relating to economic co-ordination between the Unified Command of the United Nations and the Republic of Korea'—by 'the United States of America acting pursuant to the resolutions of the Security Council of the United Nations of July 7, 1950, and July 31, 1950 (hereinafter referred to as the Unified Command)'.³ An agreement with the United Nations Korean Reconstruction Agency for the Relief and Rehabilitation of Korea (U.N.K.R.A.), an organ of the United Nations, was concluded by the United States acting in its capacity as the Unified Command pursuant to resolutions of the United Nations.⁴

The first agreement which was concluded with the Republic of Korea,

¹ *U.N. Treaty Series*, vol. 140, p. 314; vol. 148, p. 78; and vol. 177, pp. 234 and 242. Other agreements have not been registered, according to the *U.N. Treaty Series Cumulative Index*.

² *U.N. Treaty Series*, vol. 140, p. 62.

³ *Ibid.*, vol. 179, p. 34. A third agreement with Korea relating to jurisdiction over offences by the United States forces in Korea was concluded on 12 July 1950 by 'the United States of America' (*ibid.*, vol. 222, p. 229). It did not even mention the United Nations in the text or in the title or in the signature, and apparently was intended to cover only the United States contingent.

⁴ Summary in *U.S. Department of State Bulletin*, 25 (1951), p. 232.

and which assigned to the Supreme Commander of the United Nations Forces the command authority over all military forces of the Republic of Korea, was embodied in an exchange of letters between President Rhee, as President of the Republic, and General MacArthur, as Commander of the United Nations Forces, on 15/18 July 1950, before the latter had formally established the United Nations Command.¹ The Agreement for the Repatriation of Sick and Injured Captured Personnel was concluded by 'the Senior Member of the United Nations Command Liaison Group'. And the Armistice Agreement was concluded by 'the Commander-in-Chief, United Nations Command'.² Although the North Korean and Chinese representatives insisted on treating the United Nations as a party to the conflict,³ the Armistice Agreement, which was 'purely military in character', declared that it pertained 'solely to the belligerents in Korea', and provided on the other hand for commissions of 'neutral nations', which were 'defined as those nations whose combatant forces have not participated in the hostilities in Korea' (par. 37). In fact, all but one of the Members of the two 'neutral nations' commissions were Members of the United Nations. One of these (India) provided the armed forces necessary to assist the Neutral Nations Repatriation Commission in carrying out its functions.

Although the execution of the treaties concluded in respect of Korea was mostly in the hands of the United Nations Command and the United States Government, the United Nations did not refrain from invoking the provisions of the treaties concluded by the United Nations Command when the situation called for intervention of the Organization. Such a case occurred when the Republic of Korea, following the signing of the agreement on the exchange of prisoners on 8 June 1953, withdrew its representative on the armistice delegation of the United Nations Command and released some 25,000 anti-communist Korean prisoners of war held in United Nations prisoner-of-war compounds in the Republic. This caused the President of the General Assembly to send a message to the President of the Republic, in which it was stated, *inter alia*, that the release of the prisoners in question constituted a violation of the agreement on the exchange of prisoners of 8 June and of the undertaking contained in the agreement of 15 July 1950 between the President of the Republic of Korea and the Commander-in-Chief, United Nations Command, assigning to the latter the command authority over all military forces of the Republic during the period of hostilities.⁴ This action may be viewed as having been undertaken by the United Nations acting on behalf of the United Nations Force and as a party to the treaty. However, it may also be viewed as

¹ Text in *U.S. Department of State Bulletin*, 23 (1950), p. 206, and (in full) in S/1627 (mimeographed only).

³ Goodrich, *International Conciliation*, No. 494, p. 182.

⁴ *Annual Report of the Secretary-General*, 1952-3, p. 25.

² Above, p. 368.

having been undertaken in the exercise of the Organization's general responsibility with regard to the maintenance of international peace in conformity with the principles of justice and international law.¹ On another occasion, however, the United Nations presented a claim to the opposing side based on the Armistice Agreement in a manner which could normally be done only by parties to this agreement. By Resolution 906 (IX) the General Assembly

'1. *Declares* that the detention and imprisonment of the eleven American airmen, members of the United Nations Command, referred to in document A/2830, and the detention of all other captured personnel of the United Nations Command desiring repatriation is a violation of the Korean Armistice Agreement;

'2. *Condemns*, as contrary to the Korean Armistice Agreement, the trial and conviction of prisoners of war illegally detained after 25 September 1953;

'3. *Requests* the Secretary-General, in the name of the United Nations, to seek the release, in accordance with the Korean Armistice Agreement, of these eleven United Nations Command personnel, and all other captured personnel of the United Nations Command still detained;

'4. *Requests* the Secretary-General to make, by the means most appropriate in his judgment, continuing and unremitting efforts to this end.'

The United States Government registered with the U.N. Secretariat all or most of the treaties it concluded in its own name with other United Nations Members and with the Republic of Korea. Under Article 102 of the U.N. Charter, every treaty entered into by a Member of the United Nations shall be registered. The agreements with Korea, a non-member State, could thus not have been registered if the United States had considered the United Nations rather than itself a party to them.² On the other hand, the agreement with U.N.K.R.A., which was *not* registered,³ should have been registered if the United States was a party, but could not have been registered if the U.N. was a party, since an agreement between the United Nations and one of its organs is not an international agreement.

The agreements concluded by the United Nations Command (with non-member States) were none of them registered, as they should have been if the United States, alone or together with the other States contributing forces, was considered a party. Nor were they filed and recorded in accordance with Articles 10 (a) and 12 of the regulations for the registration and publication of treaties, which provide that the Secretariat shall 'file and record', and publish in the *Treaty Series*, treaties and international agreements which have been concluded by the United Nations and which are not subject to registration (because the other party is not a member State).⁴

suggest
it was
an

¹ United Nations Charter, Article 1. 1.

² The Secretariat accepts in the final analysis the views of the registering State as to registrability, see *Repertory of Practice of U.N. Organs*, Suppl. 1, vol. 2, p. 400, and the reservation made by the Secretariat in its notes in *U.N. Treaty Series*, e.g. in vol. 336, p. xiv.

³ According to the *U.N. Treaty Series Cumulative Index*.

⁴ *U.N. Treaty Series*, vol. 1, p. xxvi.

States frequently forget to register treaties, so a failure to register need not necessarily arise from legal doubts as to whether a Member State is a contracting party. However, the consistency of the failure to register the agreements concluded by the United Nations Command as opposed to those concluded by the United States Government may be taken as an indication that the United States Government was in doubt as to whether it was a party. On the other hand, the fact that they were not filed and recorded *ex officio* by the Secretariat demonstrates that the Secretariat, for its part, did not feel in a position to determine that the United Nations was a party.

The only other alternative would be to assume that the United Nations Command represented a distinct intergovernmental organization consisting of the Member States providing contingents and the Republic of Korea. However, no such organization existed.¹ The United Nations Command, in conducting military operations as well as in negotiating agreements, was subject only to the instructions of the United States Government, and the latter was not itself subject to the instructions of the Committee of Sixteen (and even less to those of any body which included Korean representation).

In paragraph 60 of the Armistice Agreement the military commanders of the two sides recommended 'to the Governments of the countries concerned on both sides' that a political conference 'of both sides' be held to settle 'the questions of the withdrawal of all foreign forces from Korea, the peaceful settlement of the Korean question, etc.' The question of the composition of the conference was thoroughly discussed by the General Assembly, where there was a large body of opinion in favour of expanding the conference to a round table conference with the participation of 'neutral nations' (India).² However, in the face of United States and Korean resistance, the Assembly finally decided, in Resolutions 711 A-B (VII) of 28 August 1953, to recommend that

'the side contributing armed forces under the Unified Command in Korea shall have as participants in the conference those among the Member States contributing armed forces pursuant to the call of the United Nations which desire to be represented, together with the Republic of Korea. The participating governments shall act independently at the conference with full freedom of action and shall be bound only by decisions or agreements to which they adhere.'

It was also recommended that the Soviet Union participate 'provided the other side desires it'. The resolution recommended, furthermore, that the United States Government, after consultation with the other participating countries, should arrange with the other side for the conference to be held. The People's Republic of China and the People's Democratic Republic of

¹ Below, p. 431.

² See *Annual Report of the Secretary-General*, 1953-4, pp. 8-10, and Goodrich, *International Conciliation*, No. 494, pp. 184-6.

Korea, in cablegrams of 13 and 15 September 1953,¹ protested against the limitation of participation in the conference to belligerent nations on both sides and proposed to add to the list the Soviet Union and certain neutral nations from South Asia.

The political conference which finally convened in Geneva from 26 April to 15 June 1954 was attended, on the United Nations side, by all States which had contributed armed forces except the Union of South Africa.² The conference did not reach agreement, but it is clear from the composition of the conference and the terms of the resolution of the General Assembly that the parties to any peace treaty would have been each of the nations providing forces (and participating in the conference) rather than the United Nations as an Organization.

Even in respect of the other treaties there does not appear to be sufficient basis for claiming that the United Nations was a party. The resolutions of the United Nations do not specifically confer upon the Unified Command or the United Nations Command the authority to conclude treaties on behalf of the Organization or otherwise to commit it legally. And it is hardly possible to read any such authority into the general clauses of the resolutions. The Security Council confined itself to authorizing the Unified Command³ to use the United Nations flag. The Council would no doubt have found it even more necessary to be explicit had it intended to confer upon the Unified Command the much more far-reaching power to conclude treaties on the United Nations' behalf. Moreover, the parties to the treaties would no doubt have made themselves clearer had they meant that the United Nations was to be a party to the treaty. The reference to the United States acting pursuant to the resolutions of the Security Council does not carry the matter any further than the resolutions themselves, as interpreted above. Only in one agreement did the United States refer to itself as agent, and even then not as agent of the United Nations, but of the United Nations Forces in Korea, and only in parenthesis. Finally, had the United Nations Secretariat felt that the United States concluded the agreements not on its own behalf, but on behalf of the United Nations, it would no doubt have raised the matter before the appropriate organ of the Organization when receiving the treaties for registration, even if, under its adopted policy, it would not in the final analysis refuse to register them in the manner requested by the United States.⁴ Nor did the United Nations in any other respect unequivocally act as a party to the treaties, by *ex officio* registration, filing and recording, or otherwise, except that on one occasion

¹ A/2469 and A/2476 incl. Corr. 1 (mimeographed only).

² Report to the United Nations on the Korean Political Conference at Geneva, *G.A.O.R.*, 9th session, Annexes, A.i.17, p. 2; cf. General Assembly Resolution 811 (IX).

³ The United Nations Command, which was not established until 25 July 1950, was not mentioned in the Security Council resolutions.

⁴ Above, p. 417, n. 2.

it presented a claim on the basis of the Armistice Agreement in a manner which only parties would normally be entitled to do.

It is accordingly submitted that the Armistice Agreement and the other military agreements with the opposing side were concluded by the United Nations Command on behalf of the United States Government and, probably, also of the other fifteen Governments providing contingents to the United Nations side;¹ and that the agreements with the Governments providing contingents, with U.N.K.R.A. (an organ of the United Nations) and probably also those with the host State, were concluded by the United States Government (in one case through the United Nations Commander, before the formal establishment of the United Nations Command) on its own behalf.

It has already been pointed out that the Collective Measures Committee, in its first report on the implementation of *the Uniting for Peace Resolution*, proposed that the 'executive military authority' should conclude agreements with the victim State and the contributing States.² The Committee did not specify in this context that this would be done on behalf of the United Nations. It may thus have envisaged the 'executive military authority' itself, rather than the United Nations, as being party to the agreements.

4. *Claims against the Force and its members*

(a) U.N.E.F. Regulation 15 provides that the Secretary-General 'shall make provisions for the settlement of claims arising with respect to the Force'. In practice, claims against *U.N.E.F. and the United Nations Force in the Congo* are settled by the United Nations, not by the State whose contingent or soldiers performed the act giving rise to the claim. The same is true of claims against members of the Force in respect of official acts³ and other acts performed in the course of their service. Thus compensation to the dependants of Egyptian nationals accidentally killed by members (sentinels) of U.N.E.F. has always been paid by the United Nations and not by the Government providing the contingent concerned. This has been done, even in cases where no official function or superior order required the member to fire and where he was therefore prosecuted in his home country for having shot the person in question.⁴

¹ On the position of the latter see below, pp. 431-4.

² Above, p. 372; cf. *G.A.O.R.*, 6th session, Suppl. No. 13, pp. 25-26.

³ These are correctly claims against the United Nations, rather than against the member concerned. This appears to be recognized in par. 10 (b) of the Congo Status Agreement, while par. 38 (b), cf. par. 12, of the U.N.E.F. Status Agreement does not give any indication one way or the other.

⁴ Cf. Secretary-General's Summary Study, *G.A.O.R.*, 13th session, Annexes, A.i.65, p. 26. At least in one case there was also a prior and additional collection among members of the contingent concerned for the benefit of the dependents. Total U.N.E.F. expenses for 'claims and

The United Nations, furthermore, lays down, unilaterally or together with the host State, the arbitral or other procedures under which claims advanced against the members of the Force personally should be settled.¹ Similarly, the host State may seek the good offices of the United Nations in order to obtain satisfaction of judgments by local courts or awards by a claims commission against members of the Force. In respect of awards by claims commissions established jointly by the Organization and the host State the United Nations even appears to have undertaken a responsibility for obtaining satisfaction.² Neither the Status Agreement with Egypt, nor the U.N.E.F. Regulations, make any mention of any role to be played by the States providing contingents in respect of civil claims against members of their contingents.

It has already been pointed out that criminal jurisdiction over members of national contingents is vested exclusively in the State providing the contingent,³ but that the host State must present any demand for such prosecution to the United Nations, not to the State concerned.⁴ Indeed, when the host State has found it necessary to make official representations or protests in respect of actions by the Force, these have been made to the representatives of the United Nations, not to representatives of the States providing contingents.⁵ However, the United Nations has accepted responsibility only in respect of actions under its authority. It has assumed no responsibility in respect of aircraft employed by States providing contingents for the purpose of transporting supplementary national supplies to their contingents in the Congo.⁶

(b) In *Korea* claims were settled, not by the United Nations, but by the Unified Command (or the United Nations Command acting under instructions from the Unified Command) or by the other participating States. None of these was acting under instructions from the United Nations and they paid any compensation out of their own funds. The agreements between the United States and the participating States provided that claims of any third Government or its nationals against the Government or

adjustments' in 1959 were \$31,100. In subsequent budgets \$20,000 were allocated 'to cover costs of individual claims against the United Nations for personal injuries, damage to property and other losses arising from traffic accidents and other effects of the operation of the Force'. Ibid., 15th session, Annexes, A.i.27, pp. 3 and 8; cf. Summary Study, *ibid.*, 13th session, Annexes, A.i.65, par. 120.

¹ Status Agreement with Egypt, *U.N. Treaty Series*, vol. 260, p. 61, pars. 12 and 38 (b) (ii); U.N.E.F. Regulation 34 (d); Status Agreement with the Congo, par. 10 (c)-11 (S/5004).

² Status Agreement with Egypt, pars. 12 i.f., and 38 (b) i.f. There is no similar provision in the Status agreement with the Congo.

³ Status Agreement with Egypt, par. 11, and with the Congo, par. 9; cf. above, Chapter II, pp. 386-7 and 396.

⁴ Above, pp. 414-15.

⁵ See, for example, S/4531, par. 23, *S.C.O.R.*, 1960, Suppl. for July-September, p. 182, and S/4417/Add. 7, *ibid.*, p. 71.

⁶ S/4724, *ibid.*, 1961, Suppl. for January-March 1961.

nationals of the participating State or *vice versa* should be a matter for disposition between the Government of the participating State and the third Government or its nationals.¹ However, the agreements did not delimit the respective liability of the parties.

Early in September 1950 the Soviet Union presented to the United States Embassy in Moscow a note protesting against the shooting down of a Soviet military aircraft over the high seas and demanding reparation. The Embassy refused to receive the note on the ground that the action having been taken by United Nations forces, the protest should have been directed to the Security Council, to which the United States reported the incident in writing and orally. The Soviet Union also transmitted the text of its note to the Security Council, not for discussion, but only because the United States letter had been circulated earlier. The Soviet representative in the Security Council qualified the question as an intergovernmental one and the United States as the sole responsible party, adding that the United Nations had nothing to do with the matter.²

In early October 1950 the Soviet Union sent another note to the United States, alleging an attack on a Soviet airfield. The Department of State asserted that the question of an attack was purely a United Nations matter and that the note was not officially before the United States. Later, the attack was admitted in a note from the United States to the United Nations, and apologies and reparations were offered, but only through the United Nations, since it was insisted that the attacking planes were under United Nations, not United States, control and that only through the United Nations could the United States be responsible.³

In a number of other cases the People's Republic of China, the People's Democratic Republic of Korea and the Soviet Union presented to the United Nations complaints of illegal warfare, including bombing of civilians and civilian property, bacterial warfare, mass murder of prisoners of war, invasion of neutral air space, bombing of neutral territory, shooting at neutral ships and aircraft, &c. However, the complaints always designated the United States, not the United Nations, as the party having committed the alleged violations of the generally accepted rules of international law on war and neutrality. The Soviet Union usually proposed resolutions to condemn the alleged acts of the United States. The terms of these draft resolutions demonstrated that the complaints were brought before the United Nations, not as the opposing side in the war responsible for the alleged violations, but rather as the world peace organization concerned

¹ See, for example, Article 4 of the agreement with the Union of South Africa, *U.N. Treaty Series*, vol. 177, p. 244.

² *S.C.O.R.*, 1950, No. 37, p. 5, and No. 38, pp. 2-4; Baxter, in this *Year Book*, 29 (1952), p. 336.

³ Taubenfeld, in *American Journal of International Law*, 45 (1951), pp. 675-6.

with the settlement of international disputes. The United Nations rejected the Soviet draft resolutions because the allegations had not been substantiated by proofs and not for the reason that they were directed at the United States. Also in some of these cases the United States admitted the possibility that its planes had inadvertently violated neutral territory and expressed its regret and its willingness to assume responsibility and pay compensation through the United Nations for any damage which an impartial investigation might show to have been caused by United States planes. The United States emphasized, moreover, that the action in Korea was being conducted in accordance with, and under the mandate of, the United Nations.¹

The basic United States position in the cases referred to above appears to have been that it was the United Nations rather than the United States which was internationally responsible for the Force. However, this view was not pressed too clearly. Had it been, then the United States would not have admitted any responsibility at all, not even through the United Nations. It would at most have declared itself willing, as an internal matter within the Organization, to reimburse the United Nations for any compensation paid. Whatever may be the significance of this distinction, the United Nations does not appear to have accepted legal responsibility in the one form or the other. It is not known whether reparations were paid in any of the cases referred to or in any similar cases, but at least there is no indication that any such payment was made by or through the United Nations. The conclusion thus is that claims against the Force have been directed against the United States (or the other participating States) and that, although the United States has in some cases declined direct responsibility, the United Nations has not assumed it.

5. *Protection of the rights of the Force and its members*

(a) Claims on behalf of *U.N.E.F. and the United Nations Force in the Congo* have been presented and representations made by the United Nations, not by the States providing contingents. Similarly, it is the United Nations, not the Governments providing contingents, which intervenes on behalf of the members of the Force for the purpose of protecting their rights in that capacity. This is obvious in the case of the Commander and other international officials serving with the staff, and also in respect of locally recruited personnel. But it also applies to members of national contingents. Indeed, U.N.E.F. Regulation 30 specifically provides that

¹ See esp. *Annual Report of the Secretary-General*, 1950-1, pp. 30 and 75-79, and *ibid.*, 1952-3, pp. 21-22; cf. *G.A.O.R.*, 7th session, 411th plenary meeting, pp. 531-60.

‘members of the Force are entitled to the legal protection of the United Nations and shall be regarded as agents of the United Nations for the purpose of such protection’.

The right of the United Nations to bring international claims in respect of injuries caused to its agents was defined by the International Court of Justice in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*.¹ The Court, by 11 votes against 4, gave the opinion that in the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, the United Nations as an Organization has the capacity to bring an international claim against the responsible *de jure* or *de facto* Government with a view to obtaining the reparation due in respect of the damage caused to the victim or to persons entitled through him. It also held that the United Nations can base such a claim only upon a breach of obligations due to itself, not upon breach of obligations due to the State of which the agent is a national. Indeed, the Court assumed that both the Organization and the national State might have the right to bring such claims in respect of the agent, but on different bases. The Organization might exercise protection where there was ‘a breach of an obligation designed to help an agent of the Organisation in the performance of his duties’. The national State could make claims in respect of ‘breach of the general obligations of a State concerning the position of aliens’; this would not, ‘as a general rule’, be within the competence of the Organization. The distinction can also be expressed by saying that the Organization is competent to protect its agent as such (functional protection), while the national State is entitled to protect him as a private individual, i.e. on the basis of rules applicable to its nationals or to individuals generally (diplomatic protection).

The division of functions and powers between the Organization and the national States must equally apply in respect of members of national contingents serving in a United Nations force. In the case of U.N.E.F. this follows from the express provision in U.N.E.F. Regulation 30, which is annexed to the agreements between the United Nations and the States providing contingents. However, it must also apply in other cases, such as the Congo, where the members of the contingents during the period of their assignment to the Force are subject to the operational orders of the United Nations in essentially the same manner as other agents of the Organization.²

In cases of violence by Congolese forces against members of national contingents of the United Nations Force in the Congo, demands and protests have been lodged by the United Nations with the Central Govern-

¹ *I.C.J., Reports*, 1949, pp. 181-8.

² U.N.E.F. Regulations 15 and 31-32.

ment and with provincial authorities.¹ The Governments of the States providing the contingents concerned have also made protests or appeals in certain grave cases.² Similarly, the Central Government and provincial authorities have presented regrets both to the United Nations³ and to the national Government concerned.⁴ Following the arrest on 3 March 1961 of three Swedish helicopter pilots in Boma, the Swedish Consulate in Leopoldville was instructed to protest to President Kasa-Vubu and to express 'the expectation of the Swedish Government that measures will be taken to prevent the recurrence of such acts of violence, which in the Swedish Government's view infringe the conditions for the presence and activities of the UN forces in the Congo in accordance with the relevant UN resolutions'.⁵ No reply was received to this protest. After a much more serious incident in Port Franqui in April 1961, resulting in the killing of several United Nations personnel, the Swedish Government instructed its representative in the Congo to lodge with President Kasa-Vubu the following protest:

'The Swedish Government, which with deep concern has taken note of the reports of the incidents in Port Franqui on 27 and 28 April, protests sharply against the brutal acts of violence committed by units of ANC against three unarmed Swedes in the UN transportation service. Two of these are still reported missing and it is feared that they have been killed. The Swedish Government associates itself with the demands for prosecution of the offenders and the reservation of the right to damages already made by the Secretary-General of the UN.'⁶

The reply from President Kasa-Vubu came to the Secretary-General of the United Nations, asking him to transmit a message to the delegations of Ghana, Sweden and the United Kingdom. In this the Congolese Government regretted 'the bloodsheds between units of the Congolese army and your contingent in the Congo' and the President presented his 'sincere regrets to your government and to the families concerned'.⁷

The acts committed by the Congolese armed forces in these and other cases where protests were made violated both the general obligations of a State concerning the position of aliens and special rules for the protection of the United Nations agents performing functions in the Congo pursuant to the invitation of the Congolese Government. The acts thus justified the concurrent exercise by the United Nations of functional protection of its agents, and by the national State of diplomatic protection of its nationals. .

¹ e.g. S/4417/Add. 8, Annex II, *S.C.O.R.*, 1960, Suppl. for July–September, p. 78; S/4753, *ibid.*, 1961, Suppl. for January–March; S/4780; S/4940/Add. 16, Annex I.

² See, for example, S/4780.

³ *S.C.O.R.*, 1960, 888th meeting, pars. 91–92; S/4940/Add. 16, Annex II.

⁴ Press *communiqué* of 29 May 1961 from the Swedish Ministry for Foreign Affairs.

⁵ Text supplied by the Swedish Ministry for Foreign Affairs.

⁶ Press *communiqué* of 13 May 1961 from the Swedish Ministry for Foreign Affairs.

⁷ Press *communiqué* of 29 May 1961 from the Swedish Ministry for Foreign Affairs.

It does not appear from the available texts that the United Nations protests have normally invoked grounds not connected with the United Nations mission of the personnel concerned (in many cases it was not considered necessary to invoke legal grounds at all). On the other hand, the second Swedish protest quoted above did not invoke grounds specifically related to the United Nations mission of the personnel. However, the first Swedish protest did so, and thus appears to conflict with the principle set forth above. Even so, more important is the fact that also the Swedish protests correctly referred to the personnel as members of the United Nations Force rather than as representatives of a national force and the national Government.¹ The United Nations protests referred to the nationality of the personnel concerned, and sometimes to their contingent, but otherwise cited their official connexion with the United Nations Force rather than with the national Government.

In concluding its Status Agreements with the host State, the United Nations has in fact assumed protection of the members of national contingents also in matters which are not directly related to their functions for the United Nations. Thus, as already pointed out, it has secured for them wide immunity also in respect of non-official acts, and has assumed powers with regard to the settlement of civilian claims against them² which would normally have been a matter for the national State. However, all such rights and functions have been provided for in order to enable the Force to perform its special functions and to secure its independence in the interest of the United Nations.³ The rights and functions are therefore based upon the status of the soldiers as members of the United Nations Force. Indeed, they could not nowadays have been assumed by a State in respect of its civilian nationals, but only in respect of its own officials, including members of its armed forces. And the fact that they have been assumed by the United Nations and not by the States providing the contingents is evidence that the force is treated externally as a United Nations Force and not as a combination of national forces.

¹ According to an Associated Press report published in *Dagbladet*, Oslo, 19 August 1960, a Canadian protest to Prime Minister Lumumba against acts of violence committed by Congolese troops against Canadian soldiers at Leopoldville airport referred to the soldiers as 'representing the Canadian Government and the Canadian people'. This statement may not have been meant to be taken literally, and at any rate was not correct in a *legal* (international law) sense. The text of the concurrent United Nations protest is reproduced in S/4417/Add. 8, Annex II, *S.C.O.R.*, 1960, Suppl. for July–September, p. 78.

² Above, p. 421; cf. Status Agreements with Egypt, par. 11 (but see par. 12 (b)), and with the Congo, pars. 9–10.

³ See the express provision to this effect in the Status Agreements with Egypt, par. 10, and with the Congo, par. 11. The rights and functions secured by the United Nations on behalf of the members of the Force do not, therefore, constitute examples of the exception implied by the International Court of Justice when it stated that claims in respect of 'a breach of the general obligations of a State concerning the position of aliens . . . would be within the competence of the national State and not, as a *general rule*, within that of the Organization'; *I.C.J. Reports*, 1949, p. 182 (*italics supplied*).

It should be noted that the agreements concluded with the host State were couched in such wide and general terms that in most or all cases it was possible to base any claims or protests made on behalf of the Force or its members on the agreements, even if this was not always done. From this point of view, the cases which can be cited, apart from U.N.E.F. Regulation 30, might not appear to go beyond what has already been stated above (pp. 413-14). However, in fact the protest notes sent by the United Nations to the Central Government of the Congo rarely referred to the basic agreement or the other special undertakings of that Government.¹ Indeed, even if it is difficult to find any cases which are clearly outside the scope of treaties concluded by the United Nations, it is clear that, not only in the case of U.N.E.F., with its express provision in U.N.E.F. Regulation 30, but also in the Congo, the Organization must be competent to present claims and exercise protection in respect of rights of the Force, or for its members as such, irrespective of whether these derive from treaties or other specific undertakings, or from general rules of international law the purpose of which is to protect the Organization (and other subjects of international law) and its agents.

(b) As for *Korea*, it has been pointed out in Chapter II, § 4, that direct action on behalf of the United Nations Force was taken by the Unified Command and, under its instructions, by the United Nations Command. Two exceptions were cited (on pp. 416-17) where the United Nations itself protested to the Republic of Korea against its release of a number of prisoners of war, and presented a claim to the opposing side on the basis of the Armistice Agreement. The United Nations on certain occasions exchanged direct communications also with the Governments opposing the United Nations Force, in attempts to obtain a cease-fire. In this correspondence, however, the United Nations confined itself to making proposals and asking questions, and, as in its protest to the Republic of Korea, it may just as well have been acting in its capacity as the world organization responsible for peace between all States, as in any capacity of legal representative of the Force.² Indeed, when concrete armistice negotiations started, these were conducted by the United Nations Command under the instructions of the Unified Command. The only case which appears clearly to imply protection by the United Nations is General Assembly Resolution 906 (IX) (quoted above, p. 417).

¹ An exception was the *note verbale* from the Secretary-General to the Central Government of 18 August, S/4417/Add. 8, Annex II, *S.G.O.R.*, 1960, Suppl. for July-September, p. 78.

² See above, pp. 367-8, with reference to *International Organization*, 5 (1951), pp. 233 et seq.; *Annual Report of the Secretary-General*, 1950-1, pp. 47-52, and 1952-3, pp. 18-21; *International Conciliation*, No. 494, p. 182, and to relevant General Assembly Resolutions, esp. Resolution 610 (VII).

6. *Conclusions*

~ (a) There is no evidence with regard to any of the United Nations forces discussed above that *the host State* has any direct control over the Force or has in any respect represented it internationally, by concluding treaties, accepting responsibility or asserting rights on its behalf. This applies not only to U.N.E.F., which had specific international functions fairly clearly distinguishable from those of the host State, but also to the Force in Korea, which went to assist the Government in a war to which the latter was already a party, and even to the Force in the Congo, which went to assist the Government in the exercise of its internal tasks.¹ Indeed, the Secretary-General was thinking primarily of relations with the host State when he laid down the principle, in respect of U.N.E.F. and later even in respect of the Congo, that the United Nations action must be separate and distinct from activities by any national authorities and that it could not be part of any joint operation.²

The conclusion clearly is that the host State does not represent internationally any of the United Nations forces so far established. Nor is there any reason to believe that any United Nations Force established pursuant to Articles 43 et seq. of the Charter or to the Uniting for Peace Resolution would be set up in a manner which would alter this situation. Only in the case of the Saar did the Council of the League of Nations, when establishing the international force, place it at the disposal and under the authority of the local government.³ However, this government was not a sovereign government, but was itself appointed by and under the authority of the League which was in the last resort internationally responsible for its acts.

(b) *U.N.E.F. and the United Nations Force in the Congo* are established by the United Nations under a Commander who is a United Nations official. The expenses are paid by the Organization directly or by reimbursement, and operational command authority and control are in its hands through the Commander appointed by it, and not in those of the States providing contingents. It is thus a true reflection of the facts when the basic documents on U.N.E.F. state expressly that the Force is an organ of the United Nations (a subsidiary organ of the General Assembly).⁴ And

¹ Cf. above, pp. 391-2, on the mandate of the Force.

² See quotation above, p. 408, for the Congo, and par. 165 of the Summary Study, *G.A.O.R.*, 13th session, Annexes, A.i.65, for U.N.E.F.

³ The Council's Resolution of 11 December 1934, *Journal Officiel* (1934), p. 1762. See also the report approved on the following day by the Council's Committee on the Saar in execution of the resolution (*ibid.*, p. 1841). The report provides, *inter alia*: 'Sous réserve des exigences d'ordre militaire que pourra comporter la situation, et sans préjudice de toute action immédiate qui pourrait être nécessaire en cas d'urgence, le commandant en chef se conformera aux demandes qui pourront lui être faites par le Président de la Commission de gouvernement aux fins d'intervention de la force en vue de maintenir ou de rétablir l'ordre.'

⁴ U.N.E.F. Regulation 6, Status Agreement with Egypt i.i., *U.N. Treaty Series*, vol. 260, p. 62; agreement with participating States U.N.E.F. par. 4, *U.N. Treaty Series*, vol. 271, p. 138. The Status Agreement with the Congo does not contain a similar provision.

the same is the case with the Force in the Congo, whose status is in all essential respects the same, but whose basic documents are not so elaborate, and whose parent organ is the Security Council rather than the General Assembly. It is logical that the forces, as subsidiary organs of the Organization, established by it and under its exclusive operational control, form part of and represent its international personality, which is distinct from that of any State; and that their acts, including the official acts of the members of the forces, create rights and obligations for the Organization, not for the several States providing contingents (nor for the host State). If it had been otherwise, the actions of the forces would not have been 'separate and distinct from activities by any national authorities', as the Secretary-General rightly insisted in the case of U.N.E.F. as well as in respect of the United Nations operation in the Congo.¹ Indeed, it appears clearly from the facts set out in §§ 3-5 above that the forces are represented internationally by the United Nations. All agreements have been concluded by officials of the United Nations or by members of the Force acting on behalf of the United Nations or the Force as an organ of the United Nations. And all known legal claims and official representations concerning the Force or its members as such have similarly been made to, or by, the United Nations (or the Force as an organ of the United Nations), except that States providing contingents, in exercising their concurrent right of diplomatic protection of their nationals, have at least in one case referred to the conditions for the presence of the United Nations Force in accordance with the relevant United Nations resolutions.² Neither the host State nor the States providing contingents are known to have exercised or contested these competences of the United Nations in respect of the forces.

The conclusion is therefore clear that international responsibility for U.N.E.F. and the United Nations Force in the Congo and for their members as such rests exclusively with the United Nations, in the same manner as for other organs of the Organization, and that the United Nations alone is entitled to present international claims on behalf of these forces and their members as such.

This conclusion applies *a fortiori* to forces *recruited individually by the United Nations*, in respect of which there are no 'participating' States which could possibly pretend to represent the force internationally. The position will presumably also be the same for a *force established pursuant to Articles 43 et seq. of the Charter*,³ although the Security Council probably is free to decide upon a different command system, which might entail a different international status of the Force.

¹ See the full quotation above, p. 408.

² Above, pp. 425-6. These protests were never intended to exclude protection by the United Nations, whatever their nature may otherwise have been.

³ Ross does not state whether his views on national command, set out above, p. 409, lead him

As for *the League of Nations Force in the Saar*, the scarce relevant data contained in published documents give no indication that international responsibility would be vested in the several States providing contingents. Indeed, all available information¹ points to the League as the international person which was internationally responsible for the Force, through its responsibility for the Government of the Saar, at whose disposal and under whose authority the Council had placed the Force.

(c) In *Korea*, the position was entirely different. The Force was established and operated by the United States Government, by which the Commander was appointed and dismissed, and to which he was responsible. He and the other members of the Force remained purely national officials and had neither the rights nor the duties of international officials.² The United States Government was also responsible for the external relations of the Force as a whole. The costs were paid by each participating Government in respect of its contingent.

The United Nations thus had no legal powers over or in respect of the Force. It did not pay the costs. And except for the General Assembly Resolution 906 (IX)³ there is no clear evidence that the Organization acted externally as a bearer of rights and duties in respect of the Force. The main relationship of the United Nations to the Force was as follows. The international force was established on the recommendation of the United Nations. It reported to the Organization (through the United States Government) and was as a matter of fact operated in accordance with the major policy recommendations of the Organization. The United Nations on a few occasions communicated directly with the host State and the opposing side, but apart from the exception referred to above, without necessarily pretending to act as legal representative of the Force. The Force and the Command bore the name of the United Nations and used its flag. Otherwise the terminology employed reflected sometimes a genuine United Nations Force, sometimes a co-ordinated action of States.⁴

to different conclusions with regard to responsibility. In any case such different conclusions could not apply to U.N.E.F. and the Congo Force, in view of the practice already referred to.

Kelsen, *The Law of the United Nations*, p. 767, although correctly pointing out that United Nations organs 'do not act on behalf of the members, but on behalf of the Organization', and that 'this becomes particularly clear when an enforcement action involving the use of armed force is taken by a majority decision of the Security Council adopted against the vote of members the armed forces of which are to be employed in this action', arrives at the conclusion that 'the Charter has created a type which is in the midst between an armed force of the United Nations distinct from the armed forces of the members' and execution of the enforcement action 'by the members through their own armed forces'. He does not discuss the question of responsibility.

¹ See above, pp. 358-9 and 428, with citations.

² It may be related, as a *curiosum*, that a United States soldier convicted under United States military law appealed against the conviction on the ground that he had been tried by the United States forces. The appeal was rejected by a United States District Court (*American Journal of International Law*, 55 (1961), p. 493). He would have suffered the same fate even under the U.N.E.F.-Congo set-up; cf. U.N.E.F. Regulation 34.

³ Above, p. 417.

⁴ Above, Chapter II, § 4, pp. 362-70.

These relations, it is submitted, are not sufficient to establish the United Nations as bearer of the rights and duties in respect of the Force, either alone, or concurrently with the United States or other Governments. The terminology used, whatever its intention may have been, cannot give the Force a status which is not supported by the actual position. The significance of the appellations used to refer to the Force, and the other points of relation to the United Nations summarized above, is primarily political; for they fasten upon the United Nations the principal political and moral responsibility for the Force. It is not excluded that they may even have some legal significance.¹ But they cannot have the effect of making the Force an organ of the United Nations,² for which the Organization would be legally responsible,³ considering that it did not have operational control.

Nor did the participating States establish any other intergovernmental organization, which as a separate subject of international law, distinct from the United Nations and the participating States, exercised control over and international rights and duties in respect of the Force. The United Nations Command, in conducting military operations as well as in negotiating the armistice agreements, was subject to the instructions of the United States, which in turn was not subject to instructions of any common organ of the participating States. The 'Committee of Sixteen'—which, moreover, did not include the Republic of Korea—was merely a forum for information and consultation and had no power to give instructions either to the Unified Command or directly to the United Nations Command.

In these circumstances the rights and duties in respect of the Force must be vested in the States which carried out the recommendations of the United Nations. How the international responsibility was divided between them is a complicated problem, which is essentially outside the scope of the present study. Indeed, the question falls within the sphere of law relating to coalition armies rather than that of the law of international organizations. Nevertheless, some tentative suggestions will now be put forward, as far as this seems possible on the basis of the very meagre information on intra-Force practice referred to above, and without having made a study of the practice of coalition armies.

First, however, it may be appropriate to make a few observations on the question of which States on the United Nations side were *parties to the war*.⁴

¹ Cf. below, pp. 434, 437-9, 462, 467-8. In particular, the relations could have sufficed to bring the Force within the scope of Article 42; cf. the Soviet proposal for a force to assist Egypt.

² Had the Force been an organ of the United Nations, the agreement with U.N.K.R.A. discussed on pp. 415-17, would not have been an international agreement and, indeed, might more properly have been replaced by an internal (organic) decision of the United Nations.

³ In this sense also Kelsen, *Recent Trends in the Law of the United Nations* (London, 1951), p. 940; cf. pp. 936-7; and Baxter, 'Constitutional Forms and some Legal Problems of International Military Command', this *Year Book*, 29 (1952), pp. 335-7. Cf. however, Taubenfeld, 'International Armed Forces and Rules of War', *American Journal of International Law*, 45 (1951), p. 675.

⁴ 'War' is used in a broad sense, see Chapter V, 3, i.i.

The Republic of Korea obviously was at war with the Governments which had invaded its territory against its active military resistance. And so was the United States, which contributed a major part of the United Nations Force,¹ and which had operational control over the entire Force. The fact that Congress never declared war (although it did pass acts assuming a state of war) and that the President even declared that the United States was not at war, but was only engaged in a 'police action' for the United Nations,² cannot, for the purpose of international law, overrule the factual nature of the hostilities,³ even if they may be considered binding in municipal law. The holdings of some municipal courts in the United States that the Korean conflict could not be considered as a war 'within what may be termed the constitutional or legal sense' are, as their terms indicate, purely matters of municipal law; and one of these was, in any event, overruled.⁴ Municipal practice was contradictory or inconclusive also in some of the other participating States.⁵ As for their international position, one could hardly say that they were at war *ipso facto*, by virtue of their modest contingents integrated in United States units and placed under United States Command. However, they could no doubt become parties to the war by declaration or by other additional acts, made by these States themselves or by the opposing side.⁶

As for the question of international responsibility with regard to *treaties*, it has already been suggested⁷ that the United States was a party to all international agreements concluded by it as the Unified Command or by the United Nations Command, and that the other fifteen participating Members of the United Nations and the Republic of Korea were probably also parties to the armistice agreement and the other agreements concluded by the United Nations Command with the opposing side. The latter point appears to follow from the terms of the armistice agreement and from general rules applicable to coalition armies. This may also have been the view of the President of the General Assembly when he, in his protest to the Republic of Korea mentioned above,⁸ characterized the unauthorized

¹ About 90 per cent. of the non-Korean forces; Goodrich, *International Conciliation*, No. 494, p. 164. Cf. below, p. 468, n. 2.

² Taubenfeld, in *American Journal of International Law*, 45 (1951), p. 673.

³ Cf. Chapter V.

⁴ See the cases reported by Brandon, *International and Comparative Law Quarterly* (1953), pp. 316-19; and by Green, *Archiv des Völkerrechts*, 6 (1956-7), pp. 420-1.

⁵ Thus the Australian Government and an Australian court considered Australia to be at war *de facto* but not *de jure*, while another court subsequently considered the country to be at peace. On this and U.K. practice, see Green, *International and Comparative Law Quarterly*, 4 (1951), pp. 462-7, and in *Archiv des Völkerrechts*, 6 (1956-7), pp. 422-4.

⁶ Cf. General Assembly Resolution 711 (VII) which recommended that 'the side contributing armed forces under the Unified Command in Korea shall have as participants in the conference those among the Member States contributing armed forces pursuant to the call of the United Nations which desire to be represented, together with the Republic of Korea'.

⁷ Above, p. 420.

⁸ On p. 416.

release by Korean troops of the North Korean prisoners of war as a violation, not only of Korea's command agreement with the U.N. Command, but also of the agreement on exchange of prisoners between the Command and the opposing side, although he did not say expressly that the violation of the latter agreement had been committed by the Republic of Korea.¹ The States providing contingents were probably not co-parties with the United States to its agreements with the host State and U.N.K.R.A. They certainly were not parties to those of the agreements which did not even mention the United Nations, nor to the agreements with other participating States.

The United States, as having operational control, must clearly also be the party responsible for the *other acts* of the Force.

It is more difficult, however, to determine the position of the other participating States. These were not, like the United States, entrusted by the United Nations with the conduct of the war, but were recommended to place their contingents under the command of the United States. Their contingents were integrated into the United States armed forces and the United States military commanders had direct command authority over all units of the contingents, without having to pass through the Government of the participating State, or necessarily through the contingent commander. Moreover, with the exception of the Republic of Korea, the participating States were not fighting to defend their national territory or for other specific national aims; they were helping the United States to carry out the recommendations of the United Nations.²

On the other hand, the role played by the participating States was in certain respects not so anonymous *vis-à-vis* the United States as was the role of the States providing contingents to U.N.E.F. and to the United Nations Force in the Congo *vis-à-vis* the United Nations. In the first place, the participating States in Korea paid their own costs and reimbursed the United States for the supplies and services provided by it.³ (In U.N.E.F. and in the Congo the position was the reverse.) In the second place, the participating States assumed, by agreement with the United States, responsibility for claims by or against third parties,⁴ although the agreements did not specify in what circumstances the claims were properly claims by or against the other participating Governments rather than by or against the United States. The relevant provisions in the agreements may have envisaged primarily civil claims, but there is nothing in the text to exclude international claims. Thirdly, all participating States were given the

¹ The participating United Nations Members, in a Declaration of 27 July 1953, also appear to have considered themselves as parties to the Armistice Agreement, see *S.C.O.R.*, 1953, Suppl. for July-September, p. 11.

² Cf. Goodrich, in *International Conciliation*, No. 494, p. 165. Cf. pp. 438, 464-5 and 467.

³ e.g. agreement between the United States and the Netherlands, Article 1 (*U.N. Treaty Series*, vol. 177, p. 234).

⁴ *Ibid.*, Articles 4-5.

opportunity, if they so wished, to take part in the peace conference and to become parties to any resulting peace treaty.¹

These three facts probably do not suffice to make the other participating States responsible jointly with the United States for the operation as a whole,² and perhaps not even for acts which cannot be attributed to any particular contingent. But the other participating States probably cannot be dissociated altogether from responsibility. It is suggested that they must be responsible, at least, for acts performed by their contingents on their own initiative, i.e. without or against orders from the United Nations Command or from other United States military authorities.³ The participating States may also be responsible for other acts performed by their contingents, at least if they should constitute war crimes, since it is even less permissible to allow a *government* to evade its responsibility on the plea of superior orders than it is in the case of individuals.⁴ Any responsibility for the participating States would not relieve the United States of its (joint) responsibility, at least not for acts performed pursuant to orders of United States commanders.

The suggestions made above may require some reconsideration in the light of the practice of coalition armies under a unified command, especially during the Second World War,⁵ although the United Nations Force in Korea differed in certain respects from the usual coalition armies and was not necessarily governed in all respects by the same rules.

The division of responsibility outlined for Korea may also hold for a force constituted under *the Uniting for Peace Resolution*, if the recommendations of the Collective Measures Committee are given effect, despite the terminology employed by this Committee in suggesting that the Force would act 'on behalf' of the United Nations.

As for *forces under the League of Nations*, the Covenant apparently envisaged an old-fashioned coalition war, conducted by the several participating Member States, which would all be parties to the war, without involving the legal responsibility of the League,⁶ although it was con-

¹ General Assembly Resolution 711 (VII), quoted above, p. 418.

² Such joint and equal responsibility would appear to be the consequence of Kelsen's view that the Commander of the Unified Force was the common organ of the Members which had unified their action by a voluntary agreement (*Recent Trends in the Law of the United Nations*, p. 940).

³ The unauthorized release by Korean troops of some 25,000 North Korean prisoners of war would be an example. However, this was a treaty violation (cf. p. 416 above), rather than a violation of the general rules of international law.

⁴ Cf. Article 8 of the Charter of the International Military Tribunal of 8 August 1945 which provides that 'the fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires' (*U.N. Treaty Series*, vol. 82, p. 288). A national contingent is, of course, in a much stronger factual position to resist superior orders than an individual member of a national force.

⁵ Baxter, this *Year Book*, 29 (1952), pp. 325-32.

⁶ Schücking and Wehberg, *Die Satzung des Völkerbundes* (2nd ed., Berlin, 1924), pp. 631-3,

sidered by the Assembly and writers that the League itself might also become a party to the war if a declaration of war was made.¹

(d) The conclusions arrived at above must in principle apply to all international rights and duties in respect of the Force and its members as such, both *vis-à-vis* the opposing side and neutrals, and to all external activities of the Force, including the conduct of hostilities, prizes, war booty, treatment of prisoners of war and civilians, administration of occupied territory, &c. Thus the United States must have over-all responsibility for the administration established by the United Nations Command in Korea north of the 38th parallel 'under the authority of the United Nations', since the United Nations did not have the effective control in regard to that part of the operation any more than to the rest of it.²

In accordance with these conclusions it appears that, while the term 'participating' States may be appropriate in cases such as Korea, Uniting for Peace and the League of Nations, when the individual States as separate international persons are wholly or partly engaged in the action, the term is not an adequate reflection of the true legal position in cases of the U.N.E.F.-Congo (and, probably, Charter Article 43 et seq.) type, where the only international person involved in the operation is the Organization itself. In the latter cases it may be more adequate to speak of 'contributing' States, as has been done in several cases,³ despite the fact that the U.N.E.F. Regulations use and define the term 'participating' States.⁴ However, since 'contributing' States has been used also in a wider sense, as including States contributing supplies and services,⁵ it may be safer to use a more specific term, e.g. States 'providing contingents', as has been done in recent U.N.E.F. budgets⁶ and in most cases above.

Λ

CHAPTER IV

COMPETENCE TO ESTABLISH AND OPERATE FORCES WITHOUT CONSTITUTIONAL PROVISIONS

The next question which arises is whether the Organization can establish an international military force only on the basis, and within the limits, of

consider that the individual State which acts against the aggressor always acts as an organ of the League, that the costs of the military operations must be borne by the League if the aggressor is not capable of covering them, and that negotiations with the aggressor on the conditions for the restoration of normal relations must be conducted by the League. They do not indicate whether corresponding legal conclusions are to be drawn with regard to external responsibility.

¹ Above, pp. 356-7, with citations.

² See *Annual Report of the Secretary General*, 1950-1, p. 45, on the relief and other civilian activities of the United Nations organs in the area.

³ e.g. General Assembly Resolution 1151 (XII) and Secretary-General's Summary Study, pars. 36 and 82.

⁵ *G.A.O.R.*, 11th session, Annexes, A.i.66, p. 14.

⁶ *Ibid.*, 15th session, Suppl. No. 5 B, p. 4.

⁴ U.N.E.F. Regulation 5 (e).

specific provisions in its constitution authorizing it to do so. The question is one of the capacity of the Organization as a whole. It is not intended to attempt to answer the questions of what organs of the Organization are competent under its constitution to create the force¹ or under what procedures it should be established.²

1. *Relation of the League of Nations Forces to Article 16 of the Covenant*

The one provision in the League of Nations Covenant which authorized the establishment of military forces was Article 16 (cf. Article 17) which applied only if a State resorted to war in disregard of its obligations under the Covenant.³ This condition was not met in any of the cases where the League actually established, or prepared to establish, an international force. The task of the League of Nations forces in Vilna, Leticia and the Saar was not to repel an aggression which had taken place, but to maintain order in these disputed territories⁴ and, conceivably, by their presence, to prevent any future aggression against these territories. The forces therefore could not be based upon Article 16 of the Covenant, and the resolutions establishing them rightly did not refer to this article or to any other article of the Covenant, neither as a legal basis for the establishment or operation of the force, or as a legal basis for requests to Member States for contingents, transit facilities or other assistance, or to the parties to the dispute for co-operation. Nevertheless, no member of the Council questioned the authority of the League to take these steps and all members voted for the establishment of the forces.⁵

2. *Relation of the United Nations Forces to Articles 42-43 of the Charter*

The only provisions of the Charter which authorize the United Nations to establish international military forces are Article 42 and subsequent articles of the Charter. These only apply if there exists a 'threat to the peace, breach of the peace or act of aggression' (Article 39). In such cases

¹ The principal provisions of the Charter which are relevant in this respect are indicated on pp. 469-71. For a general discussion of the relative competence of the Security Council, the General Assembly and the Secretariat, see, *inter alia*, Sohn, 'The Authority of the United Nations to Establish and Maintain a Permanent United Nations Force', *American Journal of International Law*, 52 (1958), pp. 229-35; Report of the Committee on the Charter of the United Nations and discussion thereof, International Law Association, *Report of the Forty-ninth Conference* (Hamburg, 1960), pp. 96-144; and Kelsen, *Recent Trends in the Law of the United Nations* (London, 1951), pp. 953 et seq.

² On the question whether an international force can be established by the Security Council in the absence of a permanent member, see the citations below, p. 440.

³ Above, pp. 356-7.

⁴ Above, p. 358.

⁵ See the resolutions establishing the Saar force in *Société des Nations, Journal Officiel*, 1934, pp. 1730 and 1762, and the reports on and discussions of the forces in Vilna and Leticia cited above, p. 358.

the Security Council may, under Article 42, apply military force 'to maintain or restore international peace and security'.¹ Article 42 appears to leave the Security Council a somewhat wider margin than did the Covenant. Nevertheless, none of those forces which have so far been established by the United Nations has been, at least not at the time of their creation, based upon Article 42 or upon any other provision of the Charter dealing with military forces.

(a) *The United Nations Field Service* was established by the Secretary-General,² under his own authority, and without referring to Article 42. His action was preceded by a resolution of the General Assembly taking note of his intention to establish the Field Service. The resolution (297 (V)) did not refer to any provision of the Charter. The preamble merely stated that the Field Service would contribute to the more efficient operation of United Nations missions and that the Secretary-General had the authority to establish it. This may be read as a reference to the general power of the Secretary-General to appoint officials and establish such units of the Secretariat as are required to meet the needs of the several organs.³ *The truce observation groups and the military observation missions*⁴ were established by the Security Council or the General Assembly, or by subsidiary organs under the authority of these organs, but again without referring to Articles 42 et seq. of the Charter. It should be noted that the Field Service and the observation groups are not armed forces and are also with regard to their functions very remote from the articles referred to.⁵ Thus they fall outside the scope of Article 42. Instead, they find some legal basis in other, general and non-military, provisions of the Charter.⁶

(b) The resolutions of the Security Council establishing the Force in *Korea* never referred to any provision of the Charter as a constitutional basis for the action. However, they referred to an 'armed attack'—which would point towards the provision on collective self-defence in Article 51⁷.

¹ Above, p. 359. On the implications of the term 'international' appearing only in the second context see Kelsen, *The Law of the United Nations* (London, 1950, and New York, 1951), pp. 731-2.

² Above, p. 353.

³ This power was stated by the Secretary-General, as based upon Articles 97 and 98, in his original proposal of 1948 for a United Nations Guard, *G.A.O.R.*, 3rd session, 2nd part, Annexes, p. 9.

⁴ Above, pp. 354-5.

⁵ See the statement of the Special Committee on the United Nations Field Service quoted above, p. 354, and, for example, the Security Council's Resolution of 21 April 1948 authorizing the Kashmir Commission to establish observers.

⁶ Quite apart from any such provisions, they have a safe basis in the general principle of the law of intergovernmental organizations discussed below, pp. 447 et seq., esp. pp. 453 et seq.

⁷ Kelsen, *Recent Trends in the Law of the United Nations* (London, 1951), p. 927. He maintains (pp. 928-31 and 936-7) that this right of collective self-defence could not be invoked, for a number of reasons, and notably because the Security Council had already taken action. However, it cannot be admitted that the fact that the Security Council had already adopted a resolution which had failed to halt the aggressor, should constitute 'measures necessary to maintain international peace and security' and should thus suffice to deprive the victim and its helpers of their inherent

—and determined the existence of ‘a breach of the peace’.¹ Such determination is one of the three alternative conditions for the application of Article 39 and the following provisions of Chapter VII of the Charter. Indeed, Article 39 was cited by the representative of the United Kingdom in introducing the proposal which became the resolution of 7 July 1950.² In explaining paragraph 3 of the resolution, recommending that Member States make their contingents available to a unified command under the United States of America, he stated:

‘Had the Charter come fully into force and had the agreement provided for in Article 43 of the Charter been concluded, we should, of course, have proceeded differently, and the action to be taken by the Security Council to repel the armed attack would no doubt have been founded on Article 42. As it is, however, the Council can naturally act only under Article 39, which enables the Security Council to recommend what measures should be taken to restore international peace and security. The necessary recommendations were duly made in the resolutions of 25 and 27 June, but in the nature of things they could only be recommendations to individual Members of the United Nations. It could not therefore be the United Nations or the Security Council which themselves appointed a United Nations commander. All the Security Council can do is to recommend that one of its members should designate the commander of the forces which individual members have now made available.’³

The United Kingdom delegation thus appears to have assumed that Article 42 could only be applied on the basis of the agreements provided for in Article 43. A statement to this effect had also been made earlier by the Secretary-General in his report on a United Nations Guard.⁴ However, any such interpretation conflicts with the broad wording of Article 42 and is not required by the *travaux préparatoires*.⁵ Article 42 does not even provide

right of collective self-defence. Even a strictly literal interpretation of Article 51 does not justify such a view. On the other hand, Kelsen (pp. 936 et seq.) also argues against the words of the President of the Security Council that ‘this is a United Nations action’, cf. below, p. 467, n. 4.

¹ Both elements were contained in all three resolutions establishing and organizing the Force, viz. those of 25 and 27 June and 7 July 1950; cf. above, Chapter II, § 4, pp. 362–3.

² At subsequent meetings Chapter VII, but no specific article thereof, was cited by the representatives of Norway (S.C.O.R., 1950, 488th meeting, p. 15), and India (ibid., 494th meeting, p. 15). The Soviet representative pointed out that on 25 June ‘no decision was taken as to what Article of the Charter should be applied and on what legal basis action should be taken’ (ibid., 494th meeting, p. 17). Kelsen, op. cit., p. 932, considers that even Article 39 was not applicable, but his arguments do not appear very convincing.

³ S.C.O.R., 1950, 476th meeting, pp. 3–4. The validity of the latter assertion, that the United Nations was precluded from itself appointing a commander, is discussed below, pp. 464–8.

⁴ G.A.O.R., 3rd session, 2nd part, Annexes, p. 10.

⁵ The reference in Article 106 to ‘such special agreements referred to in Article 43 as in the opinion of the Security Council enable it to begin the exercise of its responsibilities under Article 42’ does not necessarily imply that such agreements constitute the only basis upon which Article 42 can be implemented. Kelsen, *The Law of the United Nations*, p. 756, admits that the wording of Article 42 does not preclude the wide interpretation, but appears to draw unduly restrictive conclusions from the terminology of Articles 48 and 106, which, in the view of the present writer, were not intended to deal with this question. However this may be, Kelsen appears to be concerned with the question whether the Security Council can *compel* Member States to participate in a force otherwise than under Article 43. This is an entirely different question, which, as he points out, was answered in the negative at San Francisco, see below, pp. 439, n. 3, and 462.

that the force must necessarily consist of national contingents,¹ but leaves the way open, e.g. also for individual enlistment by the Organization.² Still less does Article 42 require that any national contingents must be provided under obligations undertaken pursuant to Article 43, rather than voluntarily.³ This interpretation was borne out by the proposal of the Soviet Union on 5 November 1956 that 'in accordance with Article 42 . . . all States Members of the United Nations . . . should give military and other assistance to the Republic of Egypt'. The proposal was later explained as envisaging participation in the aid by the forces of all Member States prepared to take part.⁴ As this proposal also seems to indicate, Article 42 does not even appear to exclude a force composed of national contingents under *national* command, such as the force actually employed in Korea.

Although the United Nations Force in Korea, like the United Nations Force proposed by the Soviet Union for the Middle East, could therefore have been based upon Article 42, it appears that the Security Council did not do so. It thus considered itself legally entitled to establish the Force without basis in any of those provisions of the Charter which specifically authorized it to establish military forces. Yet nobody in the Council questioned the legality of the action. And the challenge which was made subsequently by the absent permanent member was based upon

¹ In this sense also Goodrich and Hambro, *Charter of the United Nations* (2nd ed., Boston, 1949), p. 281; Bentwich and Martin, *A Commentary on the Charter of the United Nations* (London, 1950), p. 96; Sohn, *American Journal of International Law*, 52 (1958), p. 230; and the Committee on Study of Legal Problems of the United Nations in *Proceedings of the American Society of International Law*, 51 (1957), p. 207. While Kelsen, loc. cit., appears to consider that even under Article 42 there can only be question of use of national contingents, Sohn, loc. cit., considers that use of national contingents can be made only on the basis of Article 43. Neither view appears to be warranted.

² Article 42 provides that the Security Council 'may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.' Article 43 (1) provides: 'All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.'

In view of the general terms of Article 42 and the specific terms of Articles 43 and 45, one cannot attach decisive importance to a statement in the report of Committee III/3 at the San Francisco Conference, that the draft article which later became Article 42 'renders sacred the obligation of all states to participate in the operations'; *The United Nations Conference on International Organization, Selected Documents* (Washington, 1946), Doc. 881, part II, p. 766. Indeed, it is submitted that the duty of Member States to contribute contingents is governed exclusively by Articles 43-45; cf. below, p. 462.

³ In this sense also the Report of the Committee on the Charter of the United Nations, International Law Association, *Report of the Forty-ninth Conference* (Hamburg, 1960), pp. 137 and 143 n. Cf. also Oppenheim, *International Law*, vol. 2, § 52e. *Contra*: Sohn, loc. cit. The *travaux préparatoires* merely make it clear that Member States can be required to provide 'armed forces, assistance, and facilities' only pursuant to Article 43 (Goodrich and Hambro, op. cit., pp. 279-80; U.N.C.I.O., *Selected Documents* (Washington, 1946), Doc. 881, part I D).

⁴ See *Repertory of the Practice of the Security Council*, Suppl. 1956-8, p. 172, with summary and citations of the relevant discussion.

procedural grounds, viz. that one of the seven affirmative votes had been cast by someone who had no legal right to represent China, and that, moreover, no valid decision could be taken under Article 27. 3 of the Charter in the absence of another permanent member.¹

(c) The Armed Force under part A of the *Uniting for Peace Resolution*² was to be established pursuant to recommendations of the *General Assembly* to Member States 'if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression'. Any such force would thus be clearly outside the scope of the relevant articles of the Charter.³ Nevertheless, 52 members of the General Assembly voted for the resolution, while 2 abstained. Five members voted against it, considering that only the Security Council could establish military forces. The main emphasis in the discussion of this resolution was, naturally, upon the question of the distribution of powers between the Security Council and the General Assembly on the basis of Articles 11 (2) and 12 (2), on the one hand, and Article 24 of the Charter, on the other hand;⁴ but Articles 43 et seq. were also brought into the picture.⁵

The resolution, in its military aspect, was applied when the General Assembly, by its resolutions 498 (V) and 500 (V), found the People's Republic of China to have 'engaged in aggression' and endorsed the action already taken by the United Nations Force to resist this aggression.⁶ The General Assembly had been convened in special emergency session on the basis of the *Uniting for Peace Resolution* when it established U.N.E.F. (and when it adopted further resolutions concerning the United Nations action in the Congo).⁷ However, this does not necessarily mean that U.N.E.F. (and still less the United Nations Force in the Congo) is to be considered a force under the *Uniting for Peace Resolution*.⁸ Whatever

¹ U.S.S.R. cablegram of 29 June 1950, *S.C.O.R.*, Suppl. for June–August, p. 29. Cf. the discussion thereof in the Security Council on 7 July 1950, *ibid.*, 476th meeting, pp. 2 and 7. On the question whether decisions can be made in the absence of a permanent member, see Leo Gross, 'Voting in the Security Council, Abstention from Voting and Absence from Meetings', *Yale Law Journal*, 60 (1951), pp. 210–57, answering the question in the negative; and McDougal and Gardner, 'The Veto and the Charter. An Interpretation for Survival', *ibid.*, pp. 258–92, answering the question in the positive. According to Kelsen, *The Law of the United Nations* (London, 1950), pp. 244–5, cf. pp. 940–1, pre-Korea practice was that the absence of a member, even of a permanent member, does not prevent the Security Council from adopting a resolution.

² General Assembly Resolution 377 (V), quoted and discussed above, pp. 370–3.

³ A different matter is that the military elements which Member States under part C of the *Uniting for Peace Resolution* are recommended to hold available could also be placed at the disposal of the Security Council for action under Article 42.

⁴ See pp. 469–70 and Kelsen, *Recent Trends in the Law of the United Nations*, pp. 959 et seq.

⁵ *Repertory of the United Nations Practice*, vol. 1, pp. 316 et seq.; cf. *G.A.O.R.*, 5th session, plenary, 299th–302nd, meetings, and First Committee, 354th–365th meetings.

⁶ Above, p. 367.

⁷ Above, pp. 374 and 392.

⁸ Cf. Sohn, in *American Journal of International Law*, 52 (1958), pp. 233–4. In his second and

view one takes of this, it will be recalled that the organization and command of U.N.E.F. (and the United Nations Force in the Congo) are basically different from those proposed by the Collective Measures Committee.

(d) As has been pointed out, *U.N.E.F.* was established by resolutions of the General Assembly, after the Security Council had demonstrated itself unable to act because of the veto. The resolutions do not cite Article 42 and subsequent articles or any other specific legal basis for the action. Indeed, there is no provision of the Charter authorizing the General Assembly to establish an international military force. Nevertheless, the decision was made unanimously, with 19 abstentions and no negative votes.¹ The Soviet delegation, however, disputed the power of the Assembly to establish the force. In its explanation of its vote the delegation stated that Chapter VII of the Charter empowers only the Security Council to set up an international armed force, and that the Charter envisages the use of such a force to repel aggression, not for controlling part of the territory of a Member State. When the Soviet delegation, nevertheless, abstained on the vote, this was because Egypt had agreed to the introduction of an international force.² Contingents for the force were also offered by eastern European countries.³

When questioned in the House of Commons as to the article of the Charter under which the Force had been created, the United Kingdom Joint Under-Secretary of State for Foreign Affairs stated that it was not created under any specific article, but that it was set up as a result of resolutions passed by the General Assembly, and that no article of the Charter prevented its being set up.⁴

(e) *The United Nations Force in the Congo* was established by the Secretary-General, as authorized by the Security Council's Resolution of 13 July 1960. This resolution does not cite Articles 42 et seq. or any other provisions of the Charter, or indicate any other specific legal basis for the establishment of the Force. The resolution does not even employ any terms denoting 'threat to the peace, breach of the peace, or act of aggression', which are the conditions set out in Article 39 for the application of final report on U.N.E.F., approved in General Assembly Resolution 1001 (ES-I), the Secretary-General stated: 'Functioning, as it would, on the basis of a decision reached under the terms of the resolution "Uniting for Peace", the Force, if established, would be limited in its operations to the extent that consent of the parties concerned is required under generally recognized international law.' The latter is, however, true of any decision not based on the specific provisions of the Charter, whether or not it is based on the Uniting for Peace resolution; below, p. 462.

¹ Above, p. 375.

² *G.A.O.R.*, ES-I, pp. 127-8. This was precisely the reason which, together with the consent of the States providing contingents, constituted a necessary and sufficient legal basis for the General Assembly to create the Force; see below, p. 462. See also the not very clear statement of the representative of Colombia (*G.A.O.R.*, ES-I, p. 87), who voted in favour of the resolution.

³ *Ibid.*, Annexes, A.I.5, p. 24.

⁴ E. Lauterpacht in *International and Comparative Law Quarterly*, 6 (1957), p. 322.

the articles of Chapter VII. Nevertheless, the resolution was adopted unanimously, with no negative votes and with China, France and the United Kingdom abstaining for reasons not connected with the establishment of the Force, which they supported.¹ No member of the Council at the time questioned its power to establish the Force.

The matter had been brought up by the Secretary-General in accordance with Article 99, which provides that 'the Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security'. In his letter to the Security Council the Secretary-General used exactly these words, not those of Article 39. In his oral statement in the Council, when he formulated the request which was taken over almost exactly in the resolution adopted, the Secretary-General made no reference to a threat to the peace or to aggression. All he said on this point was that he

'must conclude from the communications received from the Government of the Congo that the presence of these [Belgian] troops is a source of internal, and potentially also of international tension. In these circumstances, the presence of the Belgian troops cannot be accepted as a satisfactory stopgap arrangement pending the re-establishment of order through the national security force.'²

It appears that also the majority of the members of the Council conceived of the resolution as establishing a force to assist in the maintenance of law and order and in the protection of life and property, thereby contributing to bringing about the withdrawal of the Belgian forces, rather than to resist external aggression, and it was in this sense that the mandate was executed. Indeed, at that stage it appears to have been the conception, not only of the Secretariat and of the majority of the members of the Security Council, but also of most of the States providing contingents, that what was being created was another non-combatant force of the U.N.E.F. type³ to assist the Central Government in maintaining internal law and order,⁴ although the force, like U.N.E.F., was to act independently and not as an organ of the Central Government. In these circumstances it was only natural that no reference was made in the resolution to any provision of Chapter VII or

¹ Above, pp. 390-1.

² *S.C.O.R.*, 1960, 873rd meeting, par. 26. In a subsequent report, dated 18 July 1960, the Secretary-General stated that it was implied in his first presentation that it was the breakdown of the instruments of the Government for the maintenance of order 'which had created a situation which through its consequences represented a threat to peace and security justifying United Nations intervention on the basis of the explicit request of the Government of the Republic of the Congo'; *ibid.*, Suppl. for July-September, p. 17 (italics supplied).

³ Indeed, prior to the adoption of the Resolution of 13 July 1960 the Secretary-General stated that he would base his actions on the U.N.E.F. experience. And he did so, see above, pp. 392-6.

⁴ This was reaffirmed, for example, by the representative of Ceylon when introducing the Resolution of 9 August 1960 (*S.C.O.R.*, 1960, 886th meeting, par. 31), and again by the Secretary-General on 7 December 1960 (*ibid.*, 913th meeting, pars. 34 and 60). Cf. above, Chapter II, § 7, pp. 391-2, on the discussion in the Council, with the minority views, and on the mandate of the Force.

to international peace and security. Indeed, it is submitted that the majority of the members of the Security Council did not at the time conceive of their resolution as based upon Chapter VII,¹ and especially not upon Articles 42 et seq.

Subsequently, in view of the delay in the withdrawal of Belgian troops and in the introduction of the United Nations Force into the province of Katanga, the fear of foreign intervention became more prominent,² and the Council in its resolution of 22 July 1960 made its first reference to international peace ('considering that the complete restoration of law and order in the Republic of the Congo would effectively contribute to the maintenance of international peace and security') and requested all States 'to refrain from any action which might undermine the territorial integrity and the political independence of the Republic of the Congo'. However, there was still no use of the terms employed in Article 39 and no reference to Chapter VII or any article therein. And the debate in the Security Council provided no further basis for the application of Chapter VII.³

On 4 August 1960 the Secretary-General stated in a message to the authorities of Katanga, who were then still refusing to admit United Nations troops to their territory:

'The Secretary-General wishes to draw attention to Article 25 of the United Nations Charter, as also to Article 49, which Articles confer on the Security Council an authority applicable directly to Governments, and *a fortiori* to subordinate territorial non-governmental authorities of Member nations. The same obligations must be regarded as applicable by analogy to nations which, like the Republic of the Congo, have been recommended for admission to the United Nations. Resistance by a Member Government to a Security Council decision has legal consequences laid down in the Charter. These sanctions necessarily apply also to the subordinate territorial organs of a nation to which the Charter rules apply.'⁴

This was backed by the Security Council in its resolution of 9 August 1960 and by the General Assembly in its Resolution 1474 (ES-IV) of 21 September 1960. These bodies respectively 'called upon' and 'requested' 'all Member States, in accordance with Articles 25 and 49 of the Charter, to accept and carry out the decisions of the Security Council and to afford mutual assistance in carrying out measures decided upon by the Security

¹ Schachter, 'Legal Aspects of the United Nations Action in the Congo', *American Journal of International Law* (1961), pp. 2-9; cf. pp. 13 et seq., considers that the action was based upon Chapter VII (and more precisely upon Article 40). However, the main facts upon which he appears to base his well-argued conclusion appear to be events which occurred *after* 13 July 1960 or formulations which were made after that date.

² Cf. Schachter, loc. cit., p. 14.

³ See, for example, the Ecuadorian statement in *S.C.O.R.*, 1960, 879th meeting, par. 73.

⁴ Ibid., Suppl. for July-September, pp. 48-49, cf. pp. 52-53. See also the Secretary-General's statement on 8 August 1960, where, *inter alia*, he cited also Chapter VII and Articles 40 and 41 thereof, while reaffirming that the Security Council's Resolutions of 14 and 22 July were not explicitly adopted under Chapter VII, but on the basis of an initiative under Article 99 (ibid., 884th meeting, pars. 22-26).

Council'. The Central Government accepted this resolution and gave assurances that it would co-operate in its implementation in accordance with Article 49.¹ The Council and the Secretary-General still maintained the principles of resort to the use of arms in self-defence only and of non-intervention in the political struggles between the various authorities in the Congo.² Indeed, they considered that the United Nations had no right to violate these principles,³ although they would not have been mandatory in the case of enforcement measures under Chapter VII.⁴ Moreover, it has been considered in another context that the Security Council has the power to make binding decisions even outside the scope of Chapter VII.⁵ Nevertheless, since the Security Council resolution refers to Article 49, which forms part of Chapter VII, it may be considered to have brought the operation of the Force within the province also of other articles of that Chapter, although no others were mentioned at the time.⁶ On 30 August 1960 the Secretary-General declared that the temporary administration, with exclusive authority, assumed by the United Nations over the earlier Belgian military bases in the Congo was 'regarded as a provisional measure in the sense of Article 40 of the Charter'.⁷ As late as 9 December 1960 the Secretary-General stated before the Security Council that 'it is even doubtful if the Council ever has acted under Chapter VII. The very most that can be said is that the Council's actions may have been under Article 40 of the Charter'.⁸ On 13 December he stated that the resolutions might be considered as implicitly taken under Article 40, but that neither the Council

¹ *S.C.O.R.*, 1960, Suppl. for July–September, p. 56 (see also pp. 99–102), cf. S/4807, Annex I. Similar statements were made by other Member States (see, for example, *ibid.*, p. 100). The Federal Republic of Germany, a non-member State, declared in a note of 13 April 1961 that it 'consistently has felt bound by the resolutions concerning the Republic of the Congo (Leopoldville) adopted by the Security Council and the General Assembly and has acted accordingly' (S/4789).

² See, for example, *S.C.O.R.*, 1960, Suppl. for July–September, pp. 52–53.

³ As late as 7 December 1960 the Secretary-General stated that under the Charter the Organization had no right to interfere in domestic problems of a political nature or to intervene forcibly in internal constitutional and political conflicts (*ibid.*, 913th meeting, pars. 17, 29 and 31). Similar statements may be found in *ibid.*, 886th meeting, pars. 42–44 (Ecuador); 70–72 and 80 (Argentina); 887th meeting, par. 44 (the Secretary-General); 889th meeting, par. 114 (China); and 915th meeting, par. 22 (the Congo). Cf. par. 4 of the Security Council Resolution of 9 August 1960, and above, Chapter II, § 7, esp. pp. 401–2.

⁴ Schachter, *loc. cit.*, pp. 5–6, points out that the prohibition in Article 2. 7 of intervention in domestic matters applies to provisional measures under Article 40, but not to enforcement measures under Articles 41 et seq. Kelsen, *The Law of the United Nations*, p. 757, states that the prohibition applies to "provisional measures" taken by the Security Council under Article 40 if not taken as "enforcement" measures, that is to say, under the sanction provided for in Article 39.⁵ See the Secretariat statement quoted on pp. 469–70.

⁶ The only reference in the discussion was to Articles 25 and 49; *S.C.O.R.*, 1960, 886th meeting, pars. 40 and 46.

⁷ *Ibid.*, Suppl. for July–September, p. 126, repeated in a letter of 14 December 1960 to the President of the Congo (*G.A.O.R.*, 15th session, Annexes, A.i.85, p. 53).

⁸ *S.C.O.R.*, 1960, 915th meeting, par. 157 and 920th meeting, par. 75. See also his subsequent statement on 17 December 1960, *G.A.O.R.*, 15th session, plenary meetings, p. 1463, and his earlier statements on 21 August, *S.C.O.R.*, 1960, 887th meeting, pars. 31 and 44.

nor the Assembly had ever endorsed this interpretation. He added that it was even more certain 'that the Council in no way directed that we go beyond the legal basis of Article 40 and into the coercive action covered by Articles 41 and 42'. Indeed, it appears clear that, whatever one thinks of its relationship to Chapter VII, the action was still not based upon Article 42. It is, as a matter of fact, doubted whether Article 42, despite its broad terms, would have been applicable to a force for the performance of internal policing tasks.¹

Only in its resolution of 21 February 1961, passed after the killing of Prime Minister Lumumba, did the Security Council use the terms of Article 39 and authorize the use of force for purposes other than self-defence. The relevant parts of the resolution read as follows:

'The Security Council,

'....

'*Deeply concerned* at the grave repercussions of these crimes and the danger of widespread civil war and bloodshed in the Congo and the threat to international peace and security,

'....

'1. *Urges* that the United Nations take immediately all appropriate measures to prevent the occurrence of civil war in the Congo, including arrangements for cease-fires, the halting of all military operations, the prevention of clashes, and the use of force, if necessary, in the last resort.

'2. *Urges* that measures be taken for the immediate withdrawal and evacuation from the Congo of all Belgian and other foreign military and para-military personnel and political advisers not under the United Nations Command, and mercenaries.'²

In execution of paragraph 2 of the resolution and of a coinciding Ordinance of the Central Government of 24 August 1961, the Force in August–December 1961 got involved in larger and more active military operations against the Katanga forces.³

In its resolution of 24 November 1961 the Security Council, without repeating any parts of Article 39, but reaffirming its earlier resolutions, extended the authority to use force by authorizing the Secretary-General 'to take vigorous action, including the use of a requisite measure of force, if necessary, for the immediate apprehension, detention pending legal action and/or deportation of all foreign military and para-military personnel and political advisers not under the United Nations Command, and mercenaries as laid down in paragraph A-2 of the Security Council resolution of 21 February 1961'.

Whatever may have been the basis of the Force's creation and earlier operation, the instructions to the Force contained in the resolutions of

¹ Schachter, loc. cit., pp. 7–8, who, moreover, considers the fact that no reference was made to Article 42 as 'persuasive evidence that the Council did not intend to apply it in this case'. He considers (pp. 4–6) that the action was based upon Article 40.

² S/4741, S.C.O.R., 1961, Suppl. for January–March. On the interpretation of this resolution see, for example, S/4789 and S/4940, pars. 1–2, cf. above, pp. 399 et seq.

³ Above, pp. 399–401.

21 February and 24 November 1961 appear, by introducing the terms of Article 39, to have based further action upon Chapter VII. More doubtful is the question whether they were based upon Article 42 or else merely upon Article 40. The resolutions offer little guidance in this respect, since they, in accordance with normal practice, do not refer to any article and not even to Chapter VII.¹ But in both resolutions the Council 'calls upon' all States, or all concerned, to take certain action, which is the terminology of Article 40. It is submitted that when, through Article 39, one has entered the field of Chapter VII, Article 42 becomes applicable in principle. And the fact that Katanga is no 'sovereign independent nation', as expressly stated in the resolution of 24 November 1961,² does not deprive it of the capacity to constitute a 'threat to the peace' or to commit a 'breach of the peace' under Article 39. Indeed, an enforcement action, and presumably even military action under Article 42, may constitutionally be applied not only against sovereign States,³ and not only against an aggressor.⁴ Although it is therefore possible to consider that since 21 February 1961 (or since August/September 1961) the Force has been acting under Article 42, it is also possible to treat the United Nations action as one under Article 40. Indeed, the terms of that article may fit the situation better than those of Article 42 if one considers that 'calls' under Article 40 may be mandatory⁵ and may be enforced without recourse to Article 42.⁶ Whatever may have been the legal basis introduced at this stage, it appears clear that the Security Council, when establishing the United Nations Force in the Congo, considered itself entitled to do so without basing itself upon Article 42 or any other article of the Charter specifically authorizing it to establish a force, and probably even without basing itself upon Chapter VII.

(f) It will be seen, in *conclusion*, that *none of the forces actually created by the League of Nations and the United Nations was established on the basis of*

¹ The official records of the relevant meetings of the Security Council were not available at the time of writing.

² S/5002. See also the following paragraphs of the preamble and operative paragraphs 1, 8 and 9 of the Resolution.

³ Kelsen, *The Law of the United Nations*, p. 731, points out that an 'enforcement action may be directed against the state or against a group of the population not having the character of a state, or against both'. Schachter, *loc. cit.*, p. 8, gave a restrictive interpretation of Article 42 which, however, is not necessarily relevant to the new situation after 21 February 1961.

⁴ Kelsen, *op. cit.*, pp. 727-30, points out that the Security Council is entitled 'to direct enforcement action against a Member which legally, that is, from the point of view of international law, is not wrong, since it has not violated any obligation expressly imposed upon it by the text of the Charter'.

⁵ In this sense Norman and Bentwich, *op. cit.*, pp. 92-93; Kelsen, *op. cit.*, p. 740; and Schachter, *loc. cit.*, pp. 6-7.

⁶ Kelsen, *op. cit.*, pp. 740-3, does not appear to think so. It should be noted that when the Resolution of 21 February 1961 authorized the use of force, if necessary, to prevent civil war, it does not appear to have been the intention to exclude the application of force to prevent offensive operations even by the central Government, i.e. by a sovereign State and Member of the United Nations.

those provisions in the constitutions of the two Organizations which specifically authorize them to establish military forces. In particular, the League of Nations forces, the U.N.E.F. and the United Nations Force in the Congo demonstrate that the Council of the League, the General Assembly and the Security Council, respectively, consider themselves competent to establish a military force to perform non-combatant tasks without basis in those provisions of the Covenant or the Charter which authorize the establishment or utilization of military forces. The United Nations Force in Korea and the Uniting for Peace Resolution demonstrate that the Security Council and the General Assembly, respectively, consider themselves competent to establish a force for international enforcement which has no basis in any specific provisions of the Charter. In the last two cases (Korea and Uniting for Peace) it was decided or proposed, respectively, that the Force, although acting in the name of or on behalf of the United Nations, should be under the command of one or more Member States, rather than of the United Nations. However, the Uniting for Peace Resolution does not lay down any such restriction.¹

Before proceeding to consider the question whether the United Nations really has the capacity to create forces in this manner and whether it can assume command over them, it is necessary to examine in general whether intergovernmental organizations also exercise powers in other respects in cases not specified in their constitution, or in circumstances other than those specified.

3. General inherent powers of intergovernmental organizations

(a) It is still a widespread view that intergovernmental organizations possess only delegated powers and that consequently each organization can exercise only the powers authorized by its particular constitution. This view is a basic premise of the major study of United Nations law, Kelsen's *The Law of the United Nations*, and was expressed, in a somewhat different form, by Judge Hackworth in his Dissenting Opinion in *Reparation for Injuries Suffered in the Service of the United Nations*:²

"There can be no gainsaying the fact that the Organization is one of delegated and enumerated powers. It is to be presumed that such powers as the Member States desired to confer upon it are stated either in the Charter or in complementary agreements concluded by them. Powers not expressed cannot freely be implied. Implied powers flow from a grant of expressed powers, and are limited to those that are "necessary" to the exercise of powers expressly granted. No necessity for the exercise

¹ See above, pp. 363-74 and 411-12, on the factual aspects of command in these cases, and below, pp. 462-8, on the constitutional power of the United Nations to assume command.

² *I.C.J. Reports*, 1949, p. 198. The doctrine of delegated powers may also be the underlying premise of the current terminology when legal writers speak of powers 'conferred upon the organization by its constitution'.

of the power here in question has been shown to exist. There is no impelling reason, if any at all, why the Organization should become the sponsor of claims on behalf of its employees.'

However, a detailed study of the practice of intergovernmental organizations reveals that this view is in clear contradiction with the facts.

(b) All intergovernmental organizations—no matter how small and technical they are or how limited their field of activity may be—exercise exclusive jurisdiction over their organs (*organic jurisdiction*, as opposed to territorial and personal jurisdiction, which is only exercised by certain international organizations). They enact regulations which govern procedure, rights and duties of the staff *vis-à-vis* the organization, and other relations within and between the several organs of the organization. All intergovernmental organizations also make administrative decisions in these respects, and many of them establish tribunals to adjudicate upon disputes, notably between officials and the organization.¹ This legislative, administrative and judicial jurisdiction is different from that exercised by non-governmental organizations over their organs; these organizations are, even in internal matters, subject to the legislative, administrative and judicial jurisdiction of the host State and can even internally act only within the limits of such jurisdiction. As far as intergovernmental organizations are concerned, no State, host or otherwise, can interfere with their internal jurisdiction, which is entirely outside the legislative, administrative and judicial authority of any State. Indeed, municipal courts have declared themselves incompetent *ratione materiae* in disputes relating to the internal relations of the organization,² without basing themselves upon any particular provisions of the constitution of the organization, in the same manner as they do in respect of disputes relating to the internal administration of foreign States.³ Intergovernmental organizations thus exercise an exclusive legislative,

¹ Such administrative tribunals or similar judicial bodies or procedures have been established by a number of organizations (U.N., I.L.O., O.E.E.C., Council of Europe, &c.) whose constitutions contain only a general provision authorizing the enactment of staff regulations, and by some organizations whose constitutions do not even contain that (League of Nations, International Court of Justice [without basing itself upon Article 101. 1 of the United Nations Charter or upon any General Assembly decision pursuant to that article]). The judicial nature, and the binding character *vis-à-vis* the administrative organs of the Organization, of the judgments of such administrative tribunals, was confirmed by the International Court of Justice in its Advisory Opinion on *Effects of Awards of Compensation Made by the UN Administrative Tribunal*, I.C.J. Reports, 1954, pp. 51–53, cf. p. 62.

² *Profili v. International Institute of Agriculture* (Rome, 26 February 1931), *Rivista di diritto internazionale*, 23 (1931), p. 386; *Chemidlin v. International Bureau of Weights and Measures* (Paris, 27 July 1945), excerpts in *Annual Digest*, 1943–1945, p. 231; *Diaz Diaz v. United Nations Economic Commission for Latin America* (Mexico, 28 April 1954). In the latter case, the Organization had a constitutional provision authorizing it to enact staff regulations (Article 101. 1 of the United Nations Charter), but this was not cited by the Court in support of its decision. The above decisions were not based upon the immunity from suit of the Organization, a distinct right which all organizations enjoy irrespective of treaty provision, and which renders municipal courts incompetent *ratione personae*.

³ See the cases reported in Hackworth, vol. 4, pp. 732–4.

administrative and judicial jurisdiction over their organs, similar to that of States over their organs (abroad). And this they do despite the fact that no provisions to this effect are included in any convention on privileges and immunities or in any headquarters agreement, and that no constitution contains any general provision in this respect. Most constitutions merely authorize some of the deliberative organs of the organization to adopt their own rules of procedure, to establish subsidiary organs, and to adopt staff regulations. And some constitutions do not even provide for that.¹ None the less, the jurisdiction is being exercised and there can be no doubt that it is binding upon the organs of the organization, including its officials in that capacity, and on Member States, in their capacity as members of such (deliberative) organs.

(c) Another example is *the capacity to conclude treaties*. Only in a few cases does the constitution contain a general authorization for the organization to conclude treaties,² but many modern constitutions authorize it to conclude treaties of a certain type. Thus the United Nations Charter specifically authorizes the Organization to conclude agreements with Member States on the provision of military contingents (Article 43) and with specialized agencies bringing them into relationship with the United Nations (Article 63). Articles 77 et seq. and 105. 3, too, could possibly be interpreted as authorizing the conclusion of trusteeship agreements and conventions on privileges and immunities with Member States, respectively.³ However, these limited provisions have not stopped the United Nations from concluding a great number of other treaties, both with States and with other intergovernmental organizations. While no agreements on military contingents have been concluded by the Security Council in the manner provided in Article 43, a number of similar agreements have been concluded by the Secretary-General in respect of U.N.E.F.⁴ In addition to the relationship and other⁵ agreements concluded with specialized agencies, the United Nations has concluded agreements with other intergovernmental organizations.⁶ Agreements on privileges and immunities have been concluded also with non-member States.⁷ However, the overwhelming

¹ Thus the O.E.E.C. adopted rules of procedure, the League of Nations staff regulations and a great number of organizations financial regulations, despite the absence of any relevant provisions in their constitution.

² e.g. the constitution of the International Refugee Organization, Article 2. 2 (e).

³ None of these articles specify that the United Nations may be a party to the agreements in question. For a closer examination of these provisions, see Parry in this *Year Book*, 26 (1949), pp. 122-31.

⁴ Above, p. 375, cf. pp. 412-15.
⁵ e.g. agreements extending the competence of the United Nations Administrative Tribunal (see e.g. *U.N. Treaty Series*, vol. 219, p. 388), and the agreement with W.H.O. regarding a medical programme for Palestine refugees (ibid., vol. 103, p. 129).

⁶ See, for example, the numerous transfer and other agreements with the League of Nations and U.N.R.R.A. listed in the *U.N. Treaty Series Cumulative Index*, No. 1, pp. 476 and 478.

⁷ Interim arrangement with Switzerland on privileges and immunities, *U.N. Treaty Series*, vol. 1, p. 163.

number of agreements concluded by the United Nations relate to entirely different fields, notably to technical and other assistance rendered by the Organization or its autonomous organs to Member and non-member States.¹ Indeed, *only a small fraction of the treaties concluded by the United Nations fall within the categories authorized in the Charter*. The same applies to a number of other organizations.² In addition, organizations whose constitutions do not authorize the conclusion of any kind of treaties have, none the less, concluded treaties with States, e.g. headquarters agreements, and with other intergovernmental organizations, e.g. on co-operation. This has been done, not merely by large political organizations like the League of Nations, but also by the smallest and oldest technical organizations.³ It cannot be seriously argued that most of these treaties are merely contracts of municipal law, or that it is the several Member States rather than the organizations as such which are parties to them.⁴ Yet it has never been claimed that any of these treaties are invalid because the organization did not have the power under any provision of its constitution to conclude them,⁵ provided that no constitutional provision precluded it from so doing. Nevertheless, the invalidity of such treaties might have been pressed under the widely defended view that a treaty concluded in

¹ The United Nations Children's Fund (U.N.I.C.E.F., an autonomous organ of the United Nations set up by General Assembly Resolution 57 (I)) alone concluded more than 100 agreements and additional protocols in this category during the first ten years of its operations only. For other examples of bilateral and multilateral treaties in this and other categories, see the *U.N. Treaty Series Cumulative Index* under the headings: United Nations, United Nations Appeal for Children, United Nations (International) Children's (Emergency) Fund, United Nations Relief and Works Agency for Palestine Refugees in the Near East (U.N.R.W.A.P.R.N.E.), United Nations Emergency Force.

² Thus I.C.A.O., whose constitution provides merely for agreements with other organizations (Articles 64-65), concluded—during the first ten years of its existence—about fifteen bilateral treaties with States on technical assistance, air navigation and privileges and immunities, as well as about fifty multilateral (standard) agreements to which several organizations were parties on one side and individual States on the other. See *ibid.*, under the heading International Civil Aviation Organization.

³ Thus the Hague Conference on Private International Law has concluded a Headquarters Agreement with the Netherlands despite the absence of any mention of treaty-making capacity or of privileges and immunities in its Statute of October 1951. Similarly, the International Bureau of Weights and Measures, whose constitution of 20 May 1875 is equally silent in this respect, has concluded a co-operation agreement with U.N.E.S.C.O., as well as a 'convention' with France, dated 4 October 1875, concerning the placing of the *Pavillon de Breteuil* at the disposal of the Bureau. If the latter convention is recognized as a treaty in international law, as is the agreement between the United Nations and Switzerland concerning the Ariana site (*U.N. Treaty Series*, vol. 1, p. 153), it may well be the oldest existing treaty concluded by an intergovernmental organization, any earlier treaties concluded by international river commissions being no longer in force. For other examples see under the various organizations in the alphabetical part of the *U.N. Treaty Series Cumulative Index*.

⁴ Cf. above, p. 405.

⁵ Kelsen, *The Law of the United Nations*, pp. 330-5 and 832-3, confines himself to stating that 'The Charter does not contain a provision authorizing the United Nations to enter into other international agreements than those expressly mentioned in the Charter', and that 'among the many technical insufficiencies of the Charter one of the worst is the lack of a general authorisation of the Organisation to enter into international agreements'. In the view of the present writer, no such general provision is necessary.

violation of constitutional restrictions is not binding.¹ Whereas this view has not been universally accepted in respect of States, it has been maintained that it must in any case apply to treaties concluded by international organizations.²

(d) Although most intergovernmental organizations do not have a territory in the same sense as States, they have occasionally been granted full or limited powers of *territorial jurisdiction*, irrespective of whether or not their constitutions authorize them to exercise such powers.

Thus *the League of Nations*, which in the Covenant was only authorized to exercise limited territorial powers in respect of mandates, acting through mandatory States, exercised full powers of government in the Saar, through a Governing Commission appointed by it;³ and limited powers in respect of Danzig, through a High Commissioner appointed by it.⁴ This was provided in the Treaty of Versailles, which was only one of the five peace treaties in which the Covenant was incorporated.—*The United Nations* has never exercised territorial jurisdiction to that extent.⁵ But it has, on certain occasions, decided to assume limited governmental functions in disputed territories, despite the fact that the Charter only authorizes it to exercise territorial powers in respect of trust territories.—Thus the annexes to the Treaty of Peace with Italy conferred upon the Security Council certain limited functions relating to the government of the proposed Free Territory of *Trieste*;⁶ and the Council, after a juridical debate, adopted, on 10 January 1947 (by 10 votes to 0 and 1 abstention (Australia)), a resolution approving the relevant annexes to the Peace Treaty and accepting the responsibilities devolving upon it under the Treaty. Some members of the Council questioned its competence to assume these responsibilities in the absence of specific authorization in the Charter. These objections were met, *inter alia*, by a reference to Article 24, which confers on the Security Council 'primary responsibility for the maintenance of international peace and security', without saying anything about the power to exercise territorial jurisdiction. However, the arguments of the opposition and the

¹ Oppenheim, *International Law*, vol. 1, §§ 497 and 516; cf. Castberg, *Folkerett* (2nd ed., Oslo, 1948), pp. 127–30.

² Jessup, *A Modern Law of Nations* (New York, 1949), p. 130; and Parry, in this *Year Book*, 26 (1949), pp. 114–17.

³ Treaty of Versailles, Articles 45–50 with Annex; cf. Council Resolution of 13 February 1920, *Société des Nations, Journal Officiel*, 1920, p. 50.

⁴ Treaty of Versailles, Articles 100–8; cf. Council Resolution of 13 February 1920 defining the duties of the High Commissioner, *ibid.*, p. 53.

⁵ The limited territorial legislative power exercised by the United Nations in its headquarters district in New York, pursuant to § 8 of its Headquarters Agreement with the United States (*U.N. Treaty Series*, vol. 11, p. 18) and by certain other organizations, such as the International Atomic Energy Agency under its Headquarters Agreement with Austria, might be said to have been authorized under the constitutional provisions on privileges and immunities (Article 105 of the Charter), although active powers of jurisdiction are not normally granted as part of privileges and immunities.

⁶ *Ibid.*, vol. 49, pp. 186 et seq.

ensuing discussion referred only to the power of the Security Council, and thus, like Article 24 itself, appear to have been concerned primarily with the distribution of powers within the Organization¹ rather than with the power of the Organization as a whole (acting through the General Assembly), although this distinction was brought out by one delegate only.²

Later in the same year the General Assembly adopted a plan for the partition of Palestine whereby the United Nations assumed certain governmental functions in the country, notably in respect of the City of *Jerusalem*, which was to be established as a *corpus separatum* under a 'special international régime'. More specifically, the City was to be administered by the United Nations through a Governor, appointed by and responsible to the Trusteeship Council and assisted by an administrative staff classed as international officers within the meaning of Article 100 of the Charter. The Governor was to exercise on behalf of the United Nations all powers of administration, including the conduct of external affairs.³ As was expressly stated in a subsequent report to the Trusteeship Council, this City was not to be a trust territory, and Chapters XII–XIII of the Charter were not generally applicable.⁴ Nevertheless, the partition plan was adopted by 33 votes to 13 (10 Moslem and 3 non-Moslem States) with 10 abstentions.⁵

While the League of Nations effectively carried out its governmental functions in the Saar, the United Nations was never able to exercise the functions assigned to it in respect of Trieste or assumed by it in respect of Jerusalem. However, this was not due to any legal incapacity of the Organization, but to the lack of co-operation of the States having control

¹ Cf. below, pp. 469–71.

² The Polish delegate who very appropriately stated: 'We do not have any legal qualms about the Security Council accepting the responsibilities it is asked to accept. I know that it may be somewhat difficult to point to a specific phrase in the Charter which would justify the taking over of the functions we are asked to assume. However, I think it would be entirely within the general spirit of the Charter of the United Nations, if it were decided to form a Free Territory under a quasi-international administration. We believe it is only proper that the United Nations, as an Organization, should be given the responsibility of supervision over its administration. And since it is a matter which involves international peace and security, we believe that the Security Council is the logical organ to carry out these functions.' *S.C.O.R.*, 1947, pp. 4–19 and 44–61. See also Schachter, in this *Year Book*, 25 (1948), pp. 96–101.

³ General Assembly Resolution 181 (II), Annex, part III; cf. General Assembly Resolutions 194 (III) and 303 (IV), and Trusteeship Council Resolution 234 (VII).

⁴ Kelsen, *The Law of the United Nations* (London, 1950), p. 687, with citations. On this basis the competence of the Trusteeship Council was denied by those opposed to the partition plan (Kelsen, *loc. cit.*, who also denies the competence). This denial, which disregards the inherent power of the General Assembly to delegate its powers to other organs, appears to have been a matter of distribution of powers between the organs of the Organization rather than one of the competence of the Organization as a whole (acting through the General Assembly) to govern a territory. In addition, several speakers of the opposition challenged the legality of the entire partition plan because it violated the right of self-determination of the peoples, because it exceeded the terms of the mandate, and for other reasons, but apparently without alleging (at least in the plenary meetings) any incompetence of the Organization to assume territorial jurisdiction not specified in the Charter (*G.A.O.R.*, 2nd session, plenary meetings, pp. 1310–1427), although certain statements might be interpreted as hints in this sense (*ibid.*, pp. 1326–7, 1329, 1338–9, 1371).

⁵ *Ibid.*, pp. 1325, 1327; cf. pp. 1370–1.

over the two territories. Indeed, if the United Nations and other modern organizations have only to a limited extent exercised territorial jurisdiction, it is for the *external* reason that most if not all territory is under the control of States, and that the United Nations, like any other authority, cannot assume jurisdiction over such territory, unless these States cede their powers. An intergovernmental organization cannot without specific legal basis impose its jurisdiction upon States. But in those cases where the States concerned have ceded their powers, or where there is no territorial sovereign,¹ it has rightly not been considered necessary to look for a provision in the constitution of the organization concerned authorizing it to exercise territorial jurisdiction.²

(e) Intergovernmental organizations also perform a number of *other international acts*, and establish organs entrusted with international functions, irrespective of whether such acts or organs have been authorized in their constitutions. Thus the United Nations and other intergovernmental organizations receive (and even send) 'diplomatic' representatives, convene intergovernmental conferences, present international claims on behalf of themselves and their officials, undertake to settle disputes with States by international arbitration, &c., even if their constitutions contain either no mention of such powers or only a limited one.³ It is not possible within the scope of the present study to examine in detail these and other acts, which are performed only by subjects of international law, and which intergovernmental organizations perform without specific constitutional basis.

(f) *Conclusion: The inherent power.* The examples given probably sufficiently demonstrate that the capacity of intergovernmental organizations is not confined to such acts or rights as are specified in their constitutions. Indeed, it is submitted that this is a well-established principle of the customary law of intergovernmental organizations. If this were not so, then a large proportion of the treaties concluded, the courts established and the

¹ Cf. below, p. 457, on *outer space*.

² During the consideration of military enforcement measures at the San Francisco Conference, an amendment presented by the Norwegian delegation, to provide that the Security Council may 'take over on behalf of the Organization the administration of any territory of which the continued administration by the state in possession is found to constitute a threat to the peace', was withdrawn, after it had been indicated that such a reference to a particular procedure could be interpreted as restrictive and of such nature as to limit the field of application of measures at the disposition of the Council (Report of rapporteur of Committee III/3 to Commission III on Chapter VIII, Section B (Doc. 881), part II B, *U.N.C.I.O., Selected Documents* (Washington, 1946). This Conference thus took the position that a general provision authorizing the Council to make binding decisions and to apply military sanctions was sufficient to establish cession of jurisdiction, and that no specific mention of territorial jurisdiction was necessary to enable the Organization to exercise such jurisdiction.

³ The United Nations Charter contains no provision in any of these respects, except that Article 62. 4 authorizes the Economic and Social Council to convene conferences, a fact which, of course, has not prevented the General Assembly from doing likewise.

other acts performed by small and large intergovernmental organizations, including the United Nations, would be unconstitutional. And *no* organization would have been entitled, e.g. to send or receive 'diplomatic' representatives or to be a party to an international arbitration. Such unconstitutionality might entail internal invalidity. According to a widely supported school of thought, it might even, at least in some cases, entail external invalidity.¹ Thus if one accepts the view referred to above, pp. 450-1, and if one were to deny the capacity of intergovernmental organizations to perform acts not specified in their constitutions, the vast majority of the treaties concluded for instance by the United Nations would have to be held null and void.

It will be seen that intergovernmental organizations, in this, as in many other respects (more than is generally realized),² are essentially in the same position as States. These too exercise exclusive organic jurisdiction over their organs abroad (even over officials of foreign nationality serving at diplomatic or consular missions abroad), exercise territorial jurisdiction, conclude treaties, send and receive diplomatic representatives, convene intergovernmental conferences, maintain armies and conduct wars, irrespective of whether their constitutions authorize them to do so. There is no basic difference between States and intergovernmental organizations with regard to organic jurisdiction. With regard to territorial and personal jurisdiction and with regard to certain international acts, such as the creation of armies and the conduct of military operations, there is, however, a considerable difference of fact. Intergovernmental organizations exercise territorial and personal jurisdiction only in exceptional cases where States cede to them part of their jurisdiction over territory or individuals (which need not be done by constitutional provision or by another treaty to which the other Member States are parties). And when an organization has no such jurisdiction, there are many international acts which it is not called upon, or is not in a practical position, to perform to the same extent as the traditional subjects of international law, States. But this is a difference of fact, not of inherent legal capacity.

The International Court of Justice has taken cognizance of the fact that

¹ See, however, below, pp. 471-5, on the external status of an international force established in violation of the constitution.

² Thus it is submitted that intergovernmental organizations enjoy certain basic privileges and immunities, including notably immunity from suit in municipal courts, even where their constitutions or the applicable agreements do not so provide. Cf. *Godman v. Winterton and Others* (representing the Intergovernmental Committee on Refugees), *The Times*, 13 March 1940; see also the action against the Pan-American Union reported by Scott-Penfield in *American Journal of International Law*, 20 (1926), p. 257 (in neither of these cases was a written opinion given, and it is thus not clear whether the courts (rightly) considered the organizations as juridical persons distinct from their several Member States). This immunity *ratione personae* is different from and embraces more than the exclusive jurisdiction *ratione materiae* discussed in (b) above. Similarly, intergovernmental organizations have an internal law of their own, which is not, as is generally assumed, part of international law, but which is, in most respects, e.g. for purposes of conflict of laws, comparable to municipal law rather than to international law.

the capacities of the United Nations are not confined to those specified in its constitution. Thus, in the Advisory Opinion on *Reparation for Injuries*, the majority of the Court stated:

‘Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by *necessary* implication as being *essential* to the performance of its duties.’¹

The Court also stated that ‘the capacity of the Organization to exercise a measure of functional protection of its agents arises by *necessary intendment* out of the Charter’.² Similarly, in its Advisory Opinion on *Effects of Awards of Compensation made by the United Nations Administrative Tribunal*, the Court pointed out that the Charter contains ‘no express provision for the establishment of judicial bodies or organs and no indication to the contrary’, but held that capacity to establish a tribunal to do justice as between the Organization and the staff members ‘arises by necessary intendment out of the Charter’.³

Even these formulations might prove too restrictive if they were to be applied literally. However, this has not been done, neither by the Court, nor by the United Nations proper. Indeed, it is difficult to find in the practice of any of these bodies, or of other intergovernmental organizations, any indication that the conditions contained in the statement of the Court quoted above have ever been applied as a real limitation upon the powers of an intergovernmental organization. Thus, when the General Assembly decided to award United Nations distinctions to personnel which had fought in Korea, it by implication overruled the Polish objections that the United Nations was not a State, that the power was not laid down in the Charter, and that such distinctions were not necessary for the performance of the Organization’s duties, as indicated by the Court.⁴ This it did despite the fact that the last objection appeared to be well founded on the normal meaning of the terms ‘necessary’ or ‘essential’ used by the Court. Similarly, it may be recalled that Judge Hackworth, in the statement quoted on p. 447 above, took the view that ‘there is no impelling reason, if any at all, why the Organization should become the sponsor of claims on behalf of its employees’, the very thing which the majority considered to arise ‘by necessary intendment’ out of the Charter. Indeed, it is submitted that, if the constitutionally competent organs have decided, under the procedure prescribed in the constitution, that the Organization shall perform a specific act in order to attain a purpose within the scope of its constitution, then a court cannot declare the act invalid because, in its view, the aim could

¹ *I.C.J. Reports*, 1949, p. 182 (italics supplied). See Fitzmaurice, in this *Year Book* 29 (1952), pp. 5-6, for a comparison of three different views expressed in the Court on the question of implied powers.

² *I.C.J. Reports*, 1949, p. 184 (italics supplied); cf. above, pp. 423-7.

³ *Ibid.*, 1954, pp. 56-57.

⁴ Above, p. 366, with citations.

have been attained without resorting to that act, or because it otherwise does not consider the act 'essential' or 'necessary' for the attainment of that aim. The Court may well have used these terms *ex abundante cautela*, or in application of the well-established judicial principle of not giving reasons which extend further than necessary to arrive at the conclusion called for in the case before the Court, without having necessarily intended them as restrictions upon the powers of an organization, should it be faced with another case which would not be covered by that formula.

The factual and legal position appears to have been more adequately described in the United Kingdom Government statement, already reported, that U.N.E.F. was not created under any specific article of the Charter, but that *no article prevented its being set up*;¹ and by Mr. Hammarskjöld, two years before his tragic death, when he stated to Danish students:

'It may have struck some of you that the possibilities I have touched upon in connection with the present international debate, and the evolution I have just dealt with as well, have little explicit support in the United Nations Charter. This is true if you apply a restrictive literal interpretation to the Charter. But it is not true if the Charter is regarded as an international treaty, establishing certain common goals for international co-operation and creating organs which the member states may use in their cooperation towards these goals, but without aiming at limiting the development of its procedures. The statement of objectives in the Charter is binding, and so are the rules concerning the various organs and their competence, but it is not necessary to regard the procedures indicated in the Charter as limitative in purpose. They may be supplemented by others under the pressure of circumstances and in the light of experience.'²

But for the reservations which may be deduced from the last sentence,³ these two statements combined appear to contain the genuinely applicable limitations upon the constitutional power of intergovernmental organizations. Indeed, it appears that while intergovernmental organizations, unlike States, are restricted by specific provisions in their constitutions as to the aims for which they shall work, such organizations are, like States, in principle free to perform any sovereign act, or any act under international law, which they are in a factual position to perform to attain these aims, provided that their constitutions do not preclude such acts. While a minority of the members will always have the right to challenge the legality, from an internal point of view, of acts performed to attain aims other than those defined in the constitution, the minority cannot challenge acts performed in order to attain aims covered in the constitution merely on the

¹ Above, p. 441, with citation.

² Dag Hammarskjöld, 'Do we need the United Nations? An Affirmative Answer', text of an address by the Secretary-General before the Students' Association, Copenhagen, 2 May 1959, p. 15. Most of the text quoted above was repeated in the *Introduction to the Annual Report of the Secretary-General*, 1958-9, p. 2 (G.A.O.R., 14th session, Suppl. No. 1A), adding the pertinent reservation 'if these additional procedures are not in conflict with what is prescribed'.

³ And from two sentences which followed it; see G.A.O.R., 14th session, Suppl. No. 1A, p. 2.

basis that such acts were not 'essential' or 'necessary' to attain these aims. Thus, it is not necessary to look for specific provisions in the constitution, or to resort to strained interpretations of texts and intentions, or to look for other constructions to justify legally the performance by an intergovernmental organization of a sovereign or international act not specifically authorized in its constitution. As an intergovernmental organization it has an *inherent power* to perform such acts, which need not be justified by construing a special authority in each case. Indeed, it is submitted that international organizations are basically *general* subjects of international law, having an inherent capacity, within the constitutional limits indicated below, to perform all such acts as are performed by the traditional subjects of international law, States; but that most organizations are not in a factual position to perform all such acts, because they have neither territory nor nationals, and because their purposes are limited in their constitutions.¹ With these practical reservations, and within the limits outlined below in (g), intergovernmental organizations must have the same legal capacity as States, e.g. to assume jurisdiction in stateless territory. If *outer space* were considered subject to unilateral occupation, then the United Nations could perform such occupation, if its assumption of sovereign rights were designed to prevent conflicts between States, to achieve international economic co-operation or to further any other purpose of the Organization.

In its Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations*, the International Court of Justice stated:

'The Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. . . . What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.'

These passages appear in the first part of the Opinion, which lead to the unanimous conclusion that the United Nations has the capacity to bring an international claim.² In saying that the legal personality is not necessarily the same as that of a State, the majority of the Court may have had in mind either the factual limitations referred to above, or restrictions in line with their statements quoted above, p. 455 (which appear in the part of the opinion which was not unanimous), or both.

¹ The writer thus does not share the widely held view that only certain (the 'larger' or the most 'important') intergovernmental organizations are international persons and only in certain respects. Whatever criteria one applies to determine the size or 'importance' of the organizations, it is not possible to establish any differences of legal relevance in this respect, quite apart from the fact that they all perform international acts. The inherent internal and international powers outlined above are discussed in detail in a broader study on the common law of intergovernmental organizations. See also below, p. 472, on the external position *vis-à-vis* non-member States.

² *I.C.J. Reports*, 1949, pp. 179 and 187; cf. pp. 205 and 217. See, however, p. 196, where Judge Hackworth stated that he concurred in the conclusion for different reasons.

While the formula applied by the majority of the International Court of Justice may, in its point of departure, theoretically appear more closely related to the doctrine of delegated powers, there is probably little or no difference as to the practical results between this formula and the doctrine of inherent powers submitted above, provided that the criteria 'necessary implication' and 'essential to the performance of its duties' continue to be applied in the same liberal way as hitherto.

(g) From an internal, constitutional point of view, the powers of inter-governmental organizations thus appear to be subject to the following limitations only:

(i) The constitutions of all intergovernmental organizations, as opposed to those of States, define and thereby limit the purposes of the organization. The organization is therefore not constitutionally entitled to perform acts designed to further other purposes.¹

(ii) The organization cannot perform acts which are precluded by any (other) provision of its constitution. Express provisions of this nature are rare. But most constitutions contain a number of provisions which expressly authorize the organization to perform certain acts which would normally fall within the scope of its inherent powers. The question may then arise whether such provisions should be interpreted *a contrario*, as precluding the exercise of similar acts in cases or under conditions not provided for. In many or most cases such a *contrario* interpretation would lead to unreasonable or even impossible results, and has not been adopted in practice.² Only when the provision concerned lays down limitations or conditions for the performance of the act is there in most cases basis for an *a contrario* interpretation.³ In many cases the provisions in question are concerned with the distribution of functions within the organization and obviously cannot be interpreted *a contrario* with regard to the competence of the organization as a whole.⁴

¹ This limitation was authoritatively stated (although in the context of internal distribution of powers rather than of capacity of the Organization as a whole) by the United Nations Secretariat in connexion with the decision of the Security Council to assume the functions assigned to it in respect of the proposed Free Territory of Trieste. See above, pp. 451-2, and the text of the statement below, pp. 469-70. The statement refers to 'the fundamental principles and purposes found in Chapter I of the Charter'. In so far as the 'principles' contain any relevant restrictions directed at the Organization (which they probably do not, apart from those which would follow anyway from the sovereign rights of Member and non-member States), these would constitute examples of (ii) below. Even the member of the Council who opposed the decision stated at one point that it was precisely this limitation he was referring to (*S.C.O.R.*, 1947, p. 57).

² See the examples cited above, pp. 448-53. On the internal plane the fact that the Statute of the International Atomic Energy Agency expressly authorizes its Board of Governors to establish committees (Article VI. I) has, of course, not prevented the General Conference from doing likewise, despite the absence of any constitutional provision to that effect.

³ But not necessarily to the exclusion of inherent powers; see below, pp. 461-2.

⁴ In many cases provisions specifying otherwise inherent powers may be useful or even necessary precisely from the point of view of internal distribution of functions. But in other cases they are superfluous and merely create confusion, by tempting legal writers either to draw a *contrario*

(iii) An act must be decided and/or performed by the organ which is competent under the constitution, and in accordance with any procedures therein prescribed. If the constitution has been badly drawn up, the competence of each principal organ may conceivably have been defined so narrowly that there is no organ which, under the internal distribution of powers, is competent to perform the act, although it falls within the (inherent) competence of the organization as a whole. However, such a case is most unlikely to arise, since normally the plenary organ and the Secretariat between them must be deemed to have any residuary powers not assigned to any specialized organs.

(iv) In addition to these purely internal, constitutional limitations, it should be noted that an intergovernmental organization has no general inherent jurisdiction over its member States, comparable to that of States over their nationals. It is true that the inherent organic jurisdiction extends also to the member States in their capacity of members of the several deliberative organs of the organization, whether or not the constitution of the organization has authorized the organ concerned to adopt rules of procedure, financial regulations, &c., and whether or not it has authorized the chairman or, on appeal, the organ itself by a majority vote, to make rulings on disputed points.¹ But outside these limits, and in particular in all functional matters, the organization cannot impose obligations upon member States, or upon non-member States or other legal subjects outside its inherent organic jurisdiction, or assume powers belonging to them, without a specific legal basis. This, however, need not necessarily be found in the constitution.² It may be found, for example, in another treaty, bilateral or multilateral, or in a unilateral act by the State concerned.³ But in the case of member States (and persons under their jurisdiction) the legal basis will, as a matter of fact, in most cases be found in the constitution of the organization. This important principle has been clearly borne out in the

conclusions which would impose upon the organization concerned restrictions which do not apply to other organizations, which were not intended by the draftsmen and which have not been observed in practice (see, for example, Kelsen, *The Law of the United Nations*, p. 144, and Julius Stone, *Aggression and World Order* (London, 1958, p. 193, n. 37))—or else to resort to strained interpretations of provisions which were never meant to cover the point.

¹ The organization may also have a limited inherent jurisdiction over the member States in their capacity as members of the organization as a whole, in such matters as their election to deliberative organs, their expulsion from the organization, or the dissolution of the organization. However, any such inherent membership jurisdiction is very limited and of little practical importance, since in most cases such powers may be deduced from the provisions of the constitution itself. In any case, such inherent membership jurisdiction is limited to certain purely organizational matters.

² *Contra*: Stone, *Aggression and World Order* (1958), p. 193. The constitutional difficulties referred to by him are, in the view of the present writer, non-existent to the extent that he is not referring to (ii) or (iii) above, since intergovernmental organizations have the capacity, within the limits listed above, to assume any functions and powers ceded to them by the States which would thereby give up rights to or come under the extended jurisdiction of the organization.

³ See the examples referred to above, p. 451.

practice of intergovernmental organizations by the fact that in these cases the organizations do not act without specific legal basis, whereas they do so when no obligations are imposed upon member States. However, this fundamental distinction is not usually brought out in the debates or in legal writings; on the contrary, the talk is rather in terms of authority having been 'conferred' upon the organization (or the organization having been 'authorized') by provisions in the constitution even in the case of inherent powers.¹ The principle is of particular importance in respect of confederations and so-called supra-national organizations,² which take over some of the regular functions of the member Governments and act on their behalf. In these respects a doctrine of 'delegated' powers is entirely appropriate, but not when the organization exercises functions on behalf of itself as a new and distinct subject of international law, without binding its member States.

The limitations listed under (i)–(iii), and in a sense even the limitation listed under (iv) in so far as member States are concerned, are internal, constitutional matters, which do not, in principle, affect the external capacity of the organization under international law³ although, as has been indicated,⁴ some writers consider that at least treaties concluded in violation of constitutional restrictions become externally invalid.

4. *Inherent power of the United Nations to establish and command forces*

It will be seen that there is complete harmony between the practice of the League of Nations and of the United Nations in establishing international forces not based on constitutional provisions, and the practice of these and other intergovernmental organizations in exercising other powers not laid down in their constitutions, or being outside the field specified in their constitutions. Indeed, on the basis of the specific and general practice referred to under 1, 2 and 3 above, it is submitted that the United Nations has legal competence, within the limits indicated on pp. 458–9, to establish military forces even in the absence of specific authority for it in the Charter. This is an inherent capacity of the Organization, and not something which was done in certain emergencies, when the Members present recognized

¹ The correct viewpoint was adopted by General Romulo, the Philippine representative to the 2nd session of the General Assembly. Opposing the partition plan for Palestine, General Romulo confined himself to stating that the policy was not 'mandatory' under any specific provision of the Charter, nor in accordance with its 'fundamental principles'; *G.A.O.R.*, 2nd session, plenary meetings, p. 1314 (italics added).

² Cf. Verdross, *Völkerrecht* (4th ed., Vienna, 1959), pp. 279–80.

³ See below, pp. 471–5, for a fuller discussion of the external effects of any unconstitutionality involved in the creation or operation of a United Nations force.

⁴ Above, pp. 450–1; cf. p. 454.

the need for a force and therefore refrained from raising legal difficulties.¹ The capacity is well within the scope of the first purpose of the United Nations as stated in Article I. 1 of the Charter:

'To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.'

This, like other inherent capacities of the Organization, could only be challenged if there were any provision in the Charter precluding the Organization from creating or operating a military force.² There is no provision which expressly does so, as there is in the constitutions of certain States.³ However, the Charter provides, in Article 42 and subsequent articles (cf. Article 39), for the right of the Security Council to make use of an international force in certain circumstances. The question then arises whether these provisions should be interpreted *a contrario*,⁴ in the sense that no military⁵ force can be established if the conditions laid down in these provisions are not fulfilled. Otherwise the provisions might seem meaningless and superfluous. However, this interpretation has not been adopted in practice (any more than an *a contrario* interpretation has been adopted in most other cases where an international constitution specifies certain inherent powers),⁶ despite the fact that Article 43 especially lays down certain conditions as to how the force should be established. Indeed, it is submitted that the legal significance of Article 42 and of subsequent articles, and of any limitations contained in them, is a different one. In this connexion it is necessary to distinguish between three questions:

- (a) The obligation of Member States to make available contingents, assistance and facilities to a United Nations force.
- (b) The obligation of Member States to permit a United Nations force to operate on their territory.
- (c) The competence of the United Nations to operate, command and exercise jurisdiction over an international force.

¹ It is thus not necessary to justify this in each case by strained interpretations of provisions of the Charter, or the 'essential' need for establishing 'a limited substitute Force able to perform at least some of the functions assigned by the Charter to the missing forces', as Sohn proposes in *American Journal of International Law*, 52 (1958), p. 230; Sohn bases himself on the statement by the International Court of Justice in the *Reparation for Injuries* case quoted above, p. 455.

² Cf. the statement of the United Kingdom Government above, p. 441.

³ See Article 9 of the Japanese constitution quoted below, p. 474, n. 2.

⁴ This is Sohn's point of departure for the construction referred to in note 1.

⁵ The United Nations Field Service and the observation groups discussed above, pp. 353-4 and 437, are not military forces, and would not be precluded by any such *a contrario* interpretation.

⁶ Above, p. 458.

(a)-(b) As has already been pointed out (see pp. 459-60 above), it is a basic principle of the law of intergovernmental organizations that no obligations can be imposed upon Member States (otherwise than in their capacity as members of particular organs of an organization), unless this is authorized by a specific provision in the constitution (or by another treaty, or by a unilateral act of the State concerned). It is this authorization which must be sought in Articles 42 and subsequent relevant articles of the Charter. And it is in this respect that the conditions and limitations contained in these articles (cf. Article 39) are relevant. In other respects the Organization can rely upon its inherent powers. Accordingly, no Member State has an obligation to contribute contingents or other direct¹ assistance to a United Nations force except under the procedure laid down in Articles 43-45.² Similarly, no party to a dispute³ has a duty to admit a United Nations force to operate in its territory except pursuant to a *decision* by the Security Council (not the General Assembly) to take military action on the basis of Articles 39 and 42.^{4*}

(c) In all other cases, i.e. when the conditions laid down in these articles are not fulfilled, or when action is taken by the General Assembly, a force can only be created by individual enlistment or by utilizing national contingents voluntarily placed at the disposal of the Organization, pursuant to a recommendation or otherwise. Moreover, the force can enter the territory of Member States only with their consent.^{5*} This, in fact, is what has been done in all cases so far.⁶ But this, as practice demonstrates, does not mean

¹ The question of the obligation of all Member States to bear the expenses incurred by the Organization in connexion with the force is a different matter. The authority for this must be sought not in Articles 42 et seq., but in Article 17. 2. The General Assembly has, by a Resolution of 20 December 1960, submitted this question to the International Court of Justice for an advisory opinion; *I.C.J. Reports*, 1961, p. 64.

² This, and no more, was expressly and authoritatively stated at the San Francisco Conference; see Goodrich and Hambro, *Charter of the United Nations* (Article 42), and report of Committee III/3 (Doc. 881, II D). Kelsen, *The Law of the United Nations*, p. 756, appears to be in doubt on this point. Cf. also the Secretariat statement on Trieste quoted and discussed below, pp. 469-70.

³ The duty of third (Member) States to accord rights of passage is especially mentioned in Article 43 and thus appears, like other kinds of assistance, to depend upon the special agreements to be concluded under that article. This was not so under Article 16. 3 of the League of Nations Covenant. Indeed, Martin and Edwards, *The Changing Charter* (London, 1955), pp. 81-82, consider that the United Nations too has a right of passage even in the absence of special agreements.

⁴ In view of the broad terms of Article 42 (quoted above, p. 439, n. 2, together with Article 43. 1), it is not necessary for the purposes of the present study to examine whether also other articles, such as Articles 40 or 53, confer a similar power upon the Security Council.

⁵ This distinction was brought out in the Soviet explanation of vote on the establishment of U.N.E.F. As reported above, p. 441, the Soviet Union justified its abstention by referring to the fact that Egypt had agreed to the introduction of an international force into its territory.

* See, however, pp. 471-3, on the question of the right of the U.N. under general international law to fight an aggressor Member or non-member State even in his own territory.

⁶ The territory of North Korea was entered, pursuant to General Assembly Resolution 376 (V), without the consent of its Government. However, the People's Democratic Republic of Korea was not a member of the United Nations. Moreover, it had committed aggression. On the position of a non-member State which has committed aggression, see below, pp. 471-3.

that the Organization cannot make binding decisions with regard to the operation of such a force. On the contrary, a force established by the Organization by individual enlistment or secondment, such as the United Nations Field Force, U.N.T.S.O. and the other truce observation groups, automatically becomes an organ of the Organization, and is subject to its exclusive organic jurisdiction in the same manner as other organs. The same applies to a force composed of national contingents if and to the extent to which the states providing them have placed them under the authority of the Organization (or under a commander appointed by and taking his orders from it), and have thereby ceded their organic jurisdiction over them. In this manner also the U.N.E.F. and the United Nations Force in the Congo have come under the exclusive organic jurisdiction of the Organization, subject to such powers as have been reserved for the States providing the contingents by their agreements with the Organization.¹ In respect of this organic jurisdiction there is no question of 'recommendations', but of 'decisions' which are directly binding upon the force and its members, as described above.²

Only the force in Korea (and the forces envisaged by the Collective Measures Committee) was not subject to the organic jurisdiction of the United Nations, because the contributing States placed their contingents under a commander appointed by the United States, rather than under one appointed by the United Nations. This they did pursuant to a recommendation contained in the Security Council's Resolution of 7 July 1950, as proposed by the United Kingdom. In his introductory statement (quoted above, p. 438), the United Kingdom representative took the position that the United Nations was precluded from itself appointing a commander, because the agreements provided for in Article 43 had not been concluded, and because the action could not therefore be based upon Article 42.

It has already been pointed out³ that there appears to be no basis in the text of Article 42 or in the *travaux préparatoires* for assuming that the article can be applied only in the circumstances laid down in Articles 43 et seq. In particular, there appears to be no basis for linking Article 43, and the hitherto unfulfilled conditions laid down therein, with the question of the obligation of Member or non-member States to admit a United Nations force to operate in their territory. Still less is there any basis for linking Article 43 to the right of a United Nations force to resist an aggressor

¹ U.N. Treaty Series, vol. 271, p. 135.

² pp. 358-62, 376-98, 406-11 and 448-9 (organic jurisdiction). It is therefore not appropriate, as has been done, to cite such cases as examples of the binding force of United Nations 'recommendations'. The latter question arises only outside the scope of the organic jurisdiction and the answer is that in principle the recommendations are not binding unless they have been given binding force by treaty or unilateral act, but that this can be done without basis in the constitution; cf. above, p. 459.

³ Above, pp. 438-9, with quotation of Articles 42 and 43 (1).

(in the territory of the invaded State), as was the situation on 7 July 1950.¹ In both these respects, Article 42, the conditions of which were met in Korea, would have afforded ample legal basis.²

It is also difficult to find legal basis in the Charter for the second implication of the United Kingdom statement, namely that the United Nations could not itself appoint a commander (and thereby itself assume command over, and legal responsibility for, the Force). Not even the subsequent Uniting for Peace Resolution imposes any restriction to that effect.³ On the contrary, it recommends that each member should maintain within its national armed forces elements which could promptly be made available

'for service as a *United Nations unit or units*, upon recommendation by the Security Council or the General Assembly, without prejudice to the use of such elements in exercise of the right of individual or collective self-defence recognized in Article 51 of the Charter.'⁴

This would appear at least to admit the possibility of an action different from the collective self-defence of States acting individually. Indeed, in the course of the discussion on the resolution, the opposition pointed out that under it the General Assembly would be empowered to assume command of armed forces and be responsible for their maintenance and allocation.⁵ Nevertheless, the Collective Measures Committee in its first report proposed that

'the Organization should authorise a State or group of States to *act on its behalf* as executive military authority, within the framework of its policies and objectives as expressed through such resolutions as it may adopt at any stage of the collective action.'⁶

In searching for a legal basis for the United Kingdom view, the following further statement of the United Kingdom representative may be of relevance:

'In conclusion, I should like to say a word regarding any possible constitution of further machinery by the Security Council. We believe that in spite of the suggestions which have been canvassed in the Press and elsewhere, there is no real need for such machinery, at any rate, at the present time. In any event, since we believe the Security

¹ Cf. below, p. 472.

² If the United Nations Force in the Congo is considered (after 21 February 1961, cf. above, p. 446) to operate under Article 42, then this constitutes a precedent against the United Kingdom interpretation.

³ See above, pp. 370-4.

⁴ General Assembly Resolution 377 (V). Italics supplied.

⁵ *Repertory of the United Nations Practice*, vol. 1, p. 317. The supporters of the resolution were less specific in this respect, cf. *ibid.*, p. 318, and *G.A.O.R.*, 5th session, plenary, 299th-302nd meetings. However, one of them very correctly pointed out that the General Assembly could not make decisions which would automatically impose commitments or enforcement obligations upon the member States (*ibid.*, p. 342). Another stated that the General Assembly was not empowered to order or to take direct enforcement action, but he derived this from Article 11.2 of the Charter (*G.A.O.R.*, 5th session, First Committee, p. 127), which is a different matter; cf. below, p. 470.

⁶ First report, *G.A.O.R.*, 6th session, Suppl. No. 13, p. 25 (italics supplied); cf. also the third report, par. 10 *if.*, *ibid.*, 9th session, Annexes, A.I.19, p. 3.

Council is acting under Article 39 of the Charter, its function is not an operative one; all it should do is to make sure that the individual efforts of the Members concerned are properly coordinated.¹

It appears from this statement that the legal reason invoked by the United Kingdom may have been based either upon the view that an intergovernmental organization must confine itself to such action as is specified in its constitution, or upon the view that Article 42 and subsequent relevant articles must be interpreted *a contrario* also in respect of assumption of command. As already pointed out, the first view is manifestly refuted by the general practice of the United Nations and other intergovernmental organizations.² The second view has been refuted by subsequent United Nations practice in respect of U.N.E.F. and the Congo in so far as forces not entrusted with a true military enforcement action against an aggressor are concerned.³

If one accepts the view submitted above, that Art. 42 and the following relevant articles should be interpreted *a contrario* only to the extent that they add to the inherent powers of the Organization—i.e. the view that it is necessary to rely upon these articles only when obligations are imposed upon Member States—then the question boils down to whether the United Nations resistance to aggression (by a force enlisted individually or composed of voluntarily contributed contingents, and operating in the territory of States with their consent) constitutes imposition upon the aggressor of an obligation. However, Member States already have an obligation not to commit aggression under Article 2 (4) of the Charter, and non-member States may have a similar obligation under the Briand-Kellogg Pact of 27 August 1928, under a bilateral non-aggression treaty, or under general international law.⁴ And the enforcement by the United Nations of this

¹ *S.C.O.R.*, 1950, 18th meeting, p. 4.

² Above, pp. 448–58.

³ Kelsen, in his post-Korea study *Recent Trends in the Law of the United Nations*, p. 940, states that the commander of a force established by recommendation under Article 39 can 'probably' only be appointed by the Security Council, as a subsidiary organ of the United Nations, 'in case of an enforcement action taken by the Security Council under Article 42'. Stone, *Aggression and World Order* (1958), pp. 176 and 190 (cf. p. 178), considers the action in Korea and the Uniting for Peace Resolution constitutional only if based upon action by individual States rather than by the United Nations. This view appears to be based upon a proposition that the United Nations can take military enforcement measures only under Articles 42 et seq., although he cites also Article 11 as a basis of his proposition. The Secretary-General, after U.N.E.F., and before the Congo, said that a fighting force could only be brought into being by the Security Council under Chapter VII (without, however, restricting his reference to Articles 42 et seq.); *Introduction to the Annual Report of the Secretary-General, 1957–8, G.A.O.R.*, 13th session, Suppl. No. 1 A, p. 2, Summary Study on the experience of U.N.E.F., *ibid.*, Annexes, A.i.65, pars. 177–80, cf. par. 167; *ibid.*, Special Political Committee, p. 63.

⁴ On the effects of the Briand-Kellogg Pact *vis-à-vis* non-contracting parties see Schwarzenberger, in International Law Association, *Report of the Forty-eighth Conference* (New York, 1958), p. 581. He also points out (p. 580) that it is uncertain whether the Briand-Kellogg Pact, which outlaws war as an instrument of national policy, *a contrario* retains the legality of war as an instrument of international or supranational policy.

already existing obligation can hardly require any specific legal basis.^{1, 2} It is not known whether the United Kingdom was prepared to argue that North Korea, not having ratified the Charter or the Pact, was legally entitled to go to war, and that the United Nations armed resistance thus constituted an attempt to impose a new obligation upon it. However this may be, the position of a non-member State is also in other respects a matter of general international law, rather than of the Charter.³

If the United Kingdom proposition (or a similar proposition based upon Article 42 only) that the United Nations was precluded from assuming command was not dictated by the terms of Article 39 or by the lack of any express power in the Charter for the United Nations to create a force, it might conceivably have been based upon a strict interpretation of Article 47 (3) which provides that 'the Military Staff Committee shall be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council'. Since the Military Staff Committee was not functioning and was not in a position to perform its task, the United Kingdom may have felt that the forces in Korea could not be 'placed at the disposal of the Security Council', but had to be placed instead at the disposal of a Member State. If one adopts such a strict interpretation of Article 47 (3), the effects will probably also extend to a force established under Article 42. Indeed, it would extend to any force

¹ Cf. the opposition of the representatives of El Salvador and India to the Canadian proposal that the consent of Israel, France and the United Kingdom should be obtained to the introduction of U.N.E.F. into Egyptian territory (*G.A.O.R.*, ES-I, pp. 69 and 70; cf. pp. 83 and 87, 3 November 1956). The Secretary-General, in his second and final report on U.N.E.F. of 6 November 1956, confined himself to stating that the force 'would be limited in its operations to the extent that consent of the parties concerned is required under generally recognised international law' (*ibid.*, Annexes, p. 20). This report was endorsed by General Assembly Resolution 1001 (ES-I) of 7 November 1956. It was not necessary to force the issue to a more clear decision because consent, and an undertaking to halt military operations, were readily given by all parties, and because certain States providing contingents in any case insisted upon all parties agreeing. In a further part of the United Kingdom Government statement on U.N.E.F. (above, p. 441), the Government spokesman referred only to the need for the consent of the State in whose territory the force would be stationed or operate, without mentioning a need for consent of the other parties (*International and Comparative Law Quarterly*, 6 (1957), p. 322). And so did the Secretary-General in his Summary Study on the experience of U.N.E.F., *G.A.O.R.*, 13th session, Annexes, A.I.65, par. 15 (cf. par. 23 on the factual concurrence of the other parties to the dispute). Cf. also par. 10 of General Assembly Resolution 503 (VI), which, in implementation of the Uniting for Peace Resolution, 'recognizes that nothing in the present resolution shall be construed to permit any measures to be taken in any State without the free and express consent of that State' (italics supplied). Such consent can of course not be required of the aggressor State, see below, p. 472.

It would, of course, involve the imposition of a new obligation if the Security Council should decide to apply military force against a State which has not violated any legal obligation (cf. Kelsen, *The Law of the United Nations*, pp. 727-30).

² The United Nations is not bound by any treaty not to use force against an aggressor. It can thus do so as a collective measure under the general provisions of the Charter (see Article 1 (1)) or in exercise of the right of collective self-defence under general international law (see below, p. 472).

³ See below, p. 472.

established by the Security Council under Chapter VII, but not to forces established by the General Assembly.¹ Thus, it was natural that Article 47 (3) did not prevent the General Assembly from assuming command over U.N.E.F. However, it did not prevent the Security Council from assuming command over the United Nations Force in the Congo either. This cannot be reconciled with a strict interpretation of Article 47 (3) if the United Nations Force in the Congo, as has been assumed,² is operated (since 21 February 1961) under Chapter VII (or even under Article 42) of the Charter. Moreover, there is no indication that the United Kingdom's proposition was based upon Article 47 (3), or that anybody else has proposed any such strict interpretation of that article.³

Should one accept the United Kingdom view—on the basis of a doctrine of delegated powers, of an *a contrario* interpretation of Article 42 also in respect of command, or of assimilating resistance to an aggressor to the imposition of an obligation upon him—one might question whether the United Nations would have been entitled to call the action in Korea a United Nations action,⁴ to authorize the Force to use its name and flag, to grant United Nations distinctions to members of the Force and exercise international protection on behalf of them,⁵ to exercise political leadership of the action through resolutions (recommendations) of the Security Council and the General Assembly, and on the whole to assume moral and political responsibility for the action to the extent that it did.⁶ Similarly, one might ask whether the United Nations would have been entitled to make the national contingents act as 'United Nations unit or units' as provided in the Uniting for Peace Resolution, or even to let the 'executive military authority' act on behalf of the Organization in the manner proposed by the Collective Measures Committee.⁷ Even if one accepts the earlier conclusion⁸ that the United Nations control over the force in these cases was not sufficiently strong to render it internationally responsible for its acts, this does not necessarily mean that the relationship between the

¹ On the other hand, it might apply only to a force composed of national contingents.

² Above, p. 446.

³ The United Nations Charter Committee of the International Law Association did not apply any such restrictive interpretation in relation to armed forces established under Article 42 and armed for defensive purposes; see the *Report of the Forty-ninth Conference* (1960), p. 137.

⁴ This was done by the President of the Security Council before calling upon the United Kingdom representative to introduce his draft resolution and to make the statement quoted above, p. 438; *S.C.O.R.*, 1950, 476th meeting, p. 2. Kelsen, *op. cit.*, pp. 936 et seq., argues against this qualification, despite the fact that the Security Council action is one of the reasons why he is unwilling to recognize the action as collective self-defence (above, p. 437, n. 7).

⁵ General Assembly Resolution 906 (IX), quoted above, Chapter III, § 3, p. 417.

⁶ A great deal of this was done already on 7 July 1950; see above, n. 4 and p. 363.

⁷ Stone, *Aggression and World Order* (London, 1958), pp. 178 and 186, who considers co-ordinated national action to be the only way in which the Uniting for Peace Resolution can be reconciled with the Charter, goes some way, but not very far, in permitting United Nations assistance to the action.

⁸ Above, pp. 430-1.

Organization and the force can be ignored from a constitutional point of view.

After having offered all these alternative legal reasons which might have underlain the United Kingdom statement in connexion with the establishment of the command in Korea, it should be observed that it is extremely doubtful whether the legal considerations referred to by the United Kingdom's representative were the decisive reasons for conferring command authority upon the United States rather than upon the United Nations. It is more likely that this course was dictated by practical considerations.¹ Indeed, at the time it appeared to be the only practical course, since the United States clearly was going to carry the main burden of the United Nations effort,² since it already had an organized command near the scene, and since there was no time to organize another. In these circumstances, and in view of the emergency situation which did not allow time for a discussion of legal niceties, it is only natural that no member of the Council found reason to question the legal grounds invoked by the United Kingdom in favour of a proposal which everybody agreed constituted the most, or only, practicable course.

In these circumstances, and in view of the fact that the United Kingdom representative did not clearly identify his legal basis and that the Collective Measures Committee did not invoke legal grounds at all, the action in Korea and the proposals of the Collective Measures Committee can hardly be cited as precedents in support of a proposition that the United Nations could not assume command over a force established outside the scope of Article 42 and subsequent articles of the Charter. There are, on the other hand, two precedents against such a proposition, namely U.N.E.F. and the United Nations Force in the Congo. However, neither of these constitutes a combat force to perform international enforcement measures against an aggressor. As for such a combat force, there is only the Uniting for Peace Resolution, which contains no restriction excluding United Nations command, but which so far has been clearly applied only in a case where the command was national.³ If, as submitted, the application of Article 42 is not dependent upon the prior conclusion of agreements pursuant to Article 43, the second implication of the United Kingdom proposition, that the United Nations could not itself assume command, is of little practical importance in relation to the Security Council in view of the wide terms of Article 42. It would in fact affect the power only of the General Assembly.

¹ See the first report of the Collective Measures Committee, *G.A.O.R.*, 6th session, Suppl. No. 13, p. 45.

² In fact, 50 per cent. of the total land forces, 86 per cent. of the total naval force and 93 per cent. of the total air force were supplied by the United States; Kunzmann, *Europa-Archiv*, 13 (1958), p. 10813. The greater part of the remainder was supplied by the Republic of Korea, a non-member State.

³ Above, p. 367, cf. pp. 374 and 441.

⁴ Above, pp. 438-9.

(d) The competence of the General Assembly is, however, also subject to express provisions of the Charter governing *the distribution of functions between the organs of the Organization*.¹ Although this problem (as pointed out on p. 436) is essentially outside the scope of the present study, it should be pointed out for the sake of completeness that, even if it is determined that the Organization as a whole has the inherent power to establish and operate military forces with the consent of the Member States concerned, the organ making a decision to this effect can only do so within its general field of competence as laid down in the Charter.

Thus *the Security Council*, as a specialized organ with restricted membership, must keep within the scope of the functions assigned to it in the Charter. However, the relevant provisions of the Charter appear to be quite broad. Article 24 confers upon the Council 'primary responsibility for the maintenance of international peace and security'. And Article 39 imposes no restriction upon the power of the Security Council to make recommendations for the maintenance or restoration of international peace and security if there is a 'threat to the peace, breach of the peace, or act of aggression'. Moreover, both the San Francisco Conference and the Secretariat and members of the Security Council have taken the view that the powers of the Security Council under Article 24 are not restricted to the specific powers listed in Chapter VII, or in other parts of the Charter. This means that the Council may act even if there is no 'threat to the peace', &c. as provided in Article 39 or 'dispute' as provided in Article 33. In the course of the discussion in the Security Council concerning the assumption by the Council of certain responsibilities in respect of the Free Territory of Trieste, the Assistant Secretary-General for Political and Security Council Affairs, Mr. Sobolev, stated:

'Paragraph 1 of Article 24 provides: "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf." The words, "primary responsibility for the maintenance of international peace and security", coupled with the phrase, "acts on their behalf", constitute a grant of power sufficiently wide to enable the Security Council to approve the documents in question and to assume the responsibilities arising therefrom.

'Furthermore, the records of the San Francisco Conference demonstrate that the powers of the Council under Article 24 are not restricted to the specific grants of authority contained in Chapters VI, VII, VIII and XII. In particular, the Secretary-General wishes to invite attention to the discussion at the fourteenth meeting of Committee III/1 at San Francisco, wherein it was clearly recognized by all the representatives

¹ Moreover, the General Assembly, in contradistinction to the Security Council acting under Articles 41 et seq., is restricted by the domestic jurisdiction clause of Article 2. 7 of the Charter. This, however, will hardly make any real difference in so far as the functions of the force are confined to the resistance of aggression.

that the Security Council was not restricted to the specific powers set forth in Chapters VI, VII, VIII and XII. (I have in mind document 597, Committee III/1/30.) It will be noted that this discussion concerned a proposed amendment to limit the obligation of Members to accept decisions of the Council solely to those decisions made under the specific powers. In the discussion, all the delegations which spoke, including both proponents and opponents of this amendment, recognized that the authority of the Council was not restricted to such specific powers. It was recognized in this discussion that the responsibility to maintain peace and security carried with it a power to discharge this responsibility. This power, it was noted, was not unlimited, but subject to the purposes and principles of the United Nations.

'It is apparent that this discussion reflects a basic conception of the Charter, namely, that the Members of the United Nations have conferred upon the Security Council powers commensurate with its responsibility for the maintenance of peace and security. The only limitations are the fundamental principles and purposes found in Chapter I of the Charter.'

It will be noted that Mr. Sobolev's statement was not confined to recommendations, as dealt with above, but was concerned also with decisions binding upon the Member States. However, in this respect Article 24 cannot justify circumvention of the limitations contained in specific articles of the Charter.² Thus, it would not be possible by a decision under Article 24 to compel Member States which have not concluded agreements under Article 43 to contribute contingents.³

The General Assembly, on the other hand, is the plenary and supreme organ which—in the United Nations as in other organizations—exercises the general functions of the Organization, including any residuary functions not assigned to other organs. However, the General Assembly cannot exercise any functions reserved exclusively for the Security Council by any provision of the Charter. Thus the General Assembly cannot establish any force in violation of Articles 11 (2) and 12 (1) (cf. Article 24), which limit the powers of the General Assembly in the field of peace and security, in recognition of the primary responsibility of the Security Council in this field. Article 12 (1) debars the General Assembly from making recommendations with regard to any dispute or situation in respect of which the Security Council is exercising the functions assigned to it. Article 11 (2) provides, *inter alia*, that any question on which 'action' is necessary shall be referred to the Security Council.⁴ The General Assembly has on two occasions

¹ S.C.O.R., 1947, pp. 41–61. Cf. above, p. 451. For discussion of this and similar subsequent cases see Schachter, 'The Development of International Law through the Legal Opinions of the UN Secretariat', this *Year Book*, 25 (1948), pp. 96–101. See also Goodrich and Hambro, *Charter of the United Nations* (Article 24).

² Cf. above, pp. 212 and 213. In this sense also Schachter, loc. cit., pp. 99 and 101, opposing a contrary statement by Eagleton in *American Journal of International Law*, 40 (1946), p. 526.

³ Kelsen, *The Law of the United Nations*, p. 756, appears to be in doubt on this point.

⁴ On the interpretation in practice of these and other relevant provisions, see *Repertory of the United Nations Practice*, vol. 1, esp. pp. 308 et seq., and Suppl. No. 1, pp. 140–3. See also Goodrich and Hambro, op. cit.; Ross, *Constitution of the United Nations* (Copenhagen, 1950), pp. 153–4; Kelsen, *Recent Trends in the Law of the United Nations*, pp. 937 (on Article 24) and pp. 959 et seq.;

(Uniting for Peace Resolution and U.N.E.F.) acted on the assumption that these provisions do not preclude it from establishing an international force without imposing such obligations as discussed under (a)–(b) above, if the Security Council fails to exercise its primary responsibility.

However these and other relevant provisions of the Charter are interpreted, it is clear that only the Security Council can *oblige* Member States to contribute contingents, that it can do so only in accordance with the specific procedure laid down in Articles 43–45, and that only the Council can oblige Member States to permit the force to operate in their territories, by a decision made in accordance with Articles 39 and 42.¹ The fact that the General Assembly cannot impose obligations upon Member States was clearly recognized by representatives which spoke in favour of the adoption of the Uniting for Peace Resolution.² And it was precisely the absence of any imposition of the force upon the host State which caused the Soviet Union not to vote against the establishment of U.N.E.F. by the General Assembly.³

5. *External status of forces established in violation of constitutional provisions*

The problem so far discussed has been whether the United Nations is competent *under its constitution* to establish and operate an international force in cases other than those specified in the Charter. The conclusion arrived at is that in this as in other respects the United Nations as an organization has an inherent power, but that it cannot impose obligations upon Member States to contribute contingents or services to the force, or to receive it in their territories without basis in the specific provisions of relevant articles of the Charter, and that the provisions on internal distribution of powers must be observed.

(a) This constitutional problem is a purely internal one, which affects only the Member States and the Organization as such in their mutual relations. Only these may question the constitutionality of an action undertaken. *Non-member States*, insurgent Governments, or other external authorities, cannot derive any rights from the constitution of an organization of which they are not members (or, if one prefers, from a treaty to which they are not parties).⁴ They are therefore not in a position to invoke

Martin and Edwards, *The Changing Charter* (London, 1955), pp. 27–28; and Stone, *Aggression and World Order* (London, 1958), p. 178, who attaches importance to the term 'maintenance' (as distinct from 'enforcement') of international peace in Article 11.

¹ Operations in the territory of an aggressor are a different matter; see above, pp. 466–7, and below, pp. 472–3.

² *G.A.O.R.*, 5th session, plenary meetings, p. 342.

³ Above, p. 441; cf. *G.A.O.R.*, ES-I, p. 128.

⁴ Except in the rare case of *pacta in favorem tertii*; cf. above, p. 414, n. 4.

any unconstitutionality of a military action of the Organization even if it is directed against their forces or their territory.

All that external parties can do is to question the competence of the United Nations *under general international law* to conduct military operations against them. But they can hardly do this with success if they have committed aggression. The right to declare war was already recognized for the League of Nations,¹ despite the absence of any provision to that effect in the Covenant, and despite the fact that the international personality of the League was never clearly recognized. As for the United Nations, the International Court of Justice has recognized unanimously (except possibly for Judge Hackworth) that the United Nations possesses objective international personality, which is also valid with respect to non-member States.² It has been demonstrated that the United Nations performs such other acts under international law as it is in a position to perform, and it has been submitted that it is indeed competent to perform any act under international law which it is in a factual position to perform.³ It would be difficult to find a legal basis for making an exception for one particular capacity to wage war. And if States under general international law have the right to exercise their inherent capacity in individual or collective self-defence,⁴ then in the absence of any special rules or considerations it must be assumed that the United Nations can exercise its capacity in the same circumstances against the forces of the aggressor in the invaded territory or against his own territory.⁵ Indeed, if the League of Nations and the United Nations did not have the capacity under general international law to conduct military operations and did not partake of the right of collective self-defence, it could be argued that the enforcement provisions of the two constitutions would not under general international law be valid against non-member States in so far as the provisions allow or require action by the Organization as such. In other words, even a military action decided and directed by the Security Council in accordance with Article 43 (and subsequent articles) could not be legitimately undertaken under general in-

¹ Above, p. 357 with citations.

² Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations*, I.C.J. Reports, 1949, p. 185; cf. pp. 187, 196, 205 and 217. ³ Above, pp. 449-58, esp. p. 457.

⁴ Stone, *Legal Controls of International Conflict* (London, 1954), p. 245, denies the basis in general international law of the right of collective self-defence. He substitutes (p. 234) the liberty of each State to resort to war under customary international law.

If the Briand-Kellogg Pact were considered to exclude collective self-defence, then any treaty of defensive alliance would be legally inoperative against a Pact-breaking State. In his report on the principle of self-defence in the United Nations Charter, Schwarzenberger points out that 'as a co-signatory of the Kellogg Pact, Norway would (in 1939-40) have had every right to discriminate in favour of the Allied Powers and against Germany as the initial aggressor in her lightning war against Poland'; International Law Association, *Report of the Forty-eighth Conference* (1958), p. 569.

⁵ As indicated on p. 465, n. 4, Schwarzenberger (loc. cit., p. 580), raises the question whether the Kellogg Pact operates at all against war as an instrument of *international policy*.

ternational law against a non-member State. This because, normally, a treaty creating an international organization, like any other treaty, could not create, *vis-à-vis* third parties, rights which the Organization does not possess under general international law, even if the constitution expressly provides for such rights as does the Charter in Article 2 (6).¹ On the other hand, once the U.N. has this capacity and this right under general international law, as it is submitted that it has, no third party can invoke any limitations which might be derived from Articles 11 (2) and 12 (1) of the Charter, which curtail the competence of the General Assembly in favour of that of the Security Council, from an *a contrario* interpretation of Article 42 and subsequent articles, or from any other provision of the Charter. This was the true legal position of the People's Democratic Republic of Korea, and this is the legal position of Katanga.²

(b) As for an aggressor *Member State*, opinions may differ as to whether, having itself violated the Charter by committing an act of aggression, it can still insist upon all its rights as a Member of the Organization.³ If the answer is yes,⁴ then it may, by virtue of its membership, be in a position to claim the 'privilege' of not being resisted, and of not having its own territory invaded, by a United Nations force established in violation of the Charter. On the other hand, the other Member States retain their right under general international law to intervene in exercise of their right of collective self-defence. If one were to follow the reasoning which might have underlain the United Kingdom statement in the Security Council on 7 July 1950 and the subsequent proposal of the Collective Measures Committee, such action by Member States might in fact come very close indeed to action by the United Nations itself, and the 'privilege' of the aggressor Member State concerned would be reduced to a right to demand that the actual command of the force be left to States.⁵

(c) Whatever view one takes of the constitutionality or otherwise of a force established and operated by the United Nations, or of the right of Member and non-member States to invoke any unconstitutionality of the force, or of the capacity of the United Nations under general international

¹ See Goodrich and Hambro, *op. cit.* (2nd ed.), pp. 108-9, and Kelsen, *op. cit.*, pp. 109-10, on the relationship of this principle to Article 2 (6) of the Charter. In the view of the present writer, military enforcement measures against a non-member State pursuant to Article 2 (6) are, on the basis indicated in the text, in full accordance with general international law if the non-member State concerned has committed aggression. It is only in the unlikely case that Article 2 (6) would be used as a basis for enforcement measures against a non-aggressor non-member State that the Organization might be over-stepping its rights under general international law.

² The actions against both of these were decided by the Security Council, and thus avoided the particular problems of Articles 11 and 12. Membership rights in respect of Katanga can be claimed only by the Government of the Republic of the Congo.

³ This question would, of course, not arise if the Security Council should decide to direct an enforcement action against a State which has not violated its legal obligations under the Charter; cf. Kelsen, *op. cit.*, pp. 727-30.

⁴ Cf. Stone, *Aggression and World Order* (1958), pp. 186-7.

⁵ Cf. above, p. 467.

law to conduct military operations, it is submitted that if the United Nations establishes a force and conducts military operations, and if genuine command and operational control are vested in the Organization, the other parties involved in the hostilities must treat it as a United Nations force rather than as a coalition of national armies. Thus *international representation of, and responsibility for, the force* must vest in the Organization in the manner described above in Chapter III. Similarly, it is submitted that during its military operations, the force is bound to observe humanitarian *laws of warfare* and is entitled to protection under them, whatever its constitutional position may be and whatever its status may be otherwise under international law.

From the point of view of international law it is generally the factual control which matters, irrespective of whether such control has been assumed in a constitutional or in an unconstitutional manner. Furthermore, war is a factual situation which must be taken into account irrespective of the legal right of the parties to resort to it.¹ Indeed, if a national government were to create or utilize an armed force in violation of constitutional provisions prohibiting armed forces or belligerency,² or requiring the consent of other organs of the State concerned, the force would externally still be a national force of that State. The same applies if a State lacks the international capacity to become a belligerent because it is not fully sovereign, or neutralized,³ or, of course, if it goes to war in violation of an obligation under international law. In none of these cases can the State concerned disclaim international responsibility for the force, nor can other States treat it as a private army, denying the State which created and operates it the right to exercise protection and other international rights in respect of

¹ The external situation of a military force and of military operations is different from that of treaties, which, as indicated on pp. 450-1, may be considered invalid if they have been concluded in violation of constitutional restrictions. In respect of treaties and other purely legal phenomena the question is merely: Does it exist or does it not? In respect of military forces there can be no question of the existence of the force—it does exist and it operates. Accordingly, the questions which impose themselves are: Who is responsible for the force, and what law applies to it? And they can hardly be solved by declaring the force invalid.

² See, for example, Article 9 of the Japanese constitution of 3 November 1946, which renounces 'war as a sovereign right of the nation' and which goes on to provide that, in order to accomplish this aim, 'land, sea and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized' (Peaslee, *Constitutions of Nations* (2nd ed., The Hague, 1956), p. 512).

Even the provision contained in the last sentence probably does not deprive any Japanese army which might be established of the protection of the humanitarian laws of warfare, and it certainly does not relieve such forces of the duty to comply with such laws. Indeed, Japan on 21 April 1953 ratified the Geneva conventions of 1949.

On the internal plane, the Japanese Supreme Court has unanimously held that Article 9 does not preclude Japan, 'in the exercise of powers inherent in a state to maintain peace and security', from taking 'whatever measures may be necessary for self-defence'. On the scope and implications of this judgment, see Yokota, 'Renunciation of War in the New Japanese Constitution', *Japanese Annual of International Law*, 4 (1960), pp. 16 et seq., esp. pp. 24-26.

³ Oppenheim, op. cit., vol. 2, §§ 74-76.

the force. And, of course, neither the force or the Government controlling it, nor the forces opposing it or their Governments, could violate customary or conventional laws of warfare on the basis that the force was illegally constituted, or that the State did not have the international capacity¹ or right to wage war, except that, in the latter case (lack of right), the State committing aggression can claim the benefit of the laws of warfare only to the extent which will be indicated in Chapter V.

In the absence of any special considerations these principles must apply also to the United Nations, as a subject of international law, if it engages in military operations.

(d) In conclusion it may be stated that the constitutional problems involved in the establishment of an international force may form the subject of an internal dispute between Member States or between the Organization and some of its members. But they do not, in principle, affect the external position of an established force any more than the position in international law of the army of a State would be affected by the fact that it had been established in violation of its constitution. The issue may be obscured if the international force is employed against a *Member* State, but even in this case the international responsibility for the force and the applicability of the humanitarian international law on warfare will remain unchanged. ✓

¹ Ibid., § 75 states that 'whenever a State lacking the legal qualification to make war nevertheless actually makes war, it is a belligerent, the contention is real war, and all the rules of International Law respecting warfare apply to it'.

PROFESSOR MANLEY OTTMER HUDSON (1886-1960)*

By LORD MCNAIR

It was with very deep regret that Professor Manley Hudson's friends in this country heard of his death in April 1960, for he had a gift of making friends and of keeping them, both inside and outside the circle of international lawyers.

His name will always be linked with two kindred ideas and movements—the League of Nations and the advancement of the rule of law between nations. To these he devoted almost the whole of his intellect, his energy and his meticulous scholarship. After two years as a member of the Legal Department of the League of Nations in its early days he spent a long series of summer vacations working in that Department and became one of the best-known figures in Geneva. He was elected to the Bemis Chair of International Law at Harvard in 1923 and occupied it for the greater part of his life. He was elected a Judge of the Permanent Court of International Justice in 1936, but his judicial career was unhappily curtailed by the outbreak of the Second World War. Between the two wars he campaigned for many years with a view to bringing his country into the Permanent Court, and towards the end of the second war he organized many groups of lawyers throughout North America in support of the establishment of the present Court.

His great work in the development of international law falls into two parts. In the first place, he made three important contributions to the apparatus of the law: in editing the four volumes of *World Court Reports*, containing the English text of all judgments and advisory opinions rendered by the Permanent Court of International Justice during its life, 1922-46, together with notes and bibliographies; in editing the series of volumes entitled *International Legislation* which he inaugurated in 1931 in order to make readily accessible, with notes and bibliographies, the vast number of treaties which have been made since the end of the First World War, together with an important introduction of sixty pages in the first volume upon the nature of law-making treaties; and, lastly, in writing his textbook entitled *The Permanent Court of International Justice*, of which the first edition was published in 1934 and the second in 1943, and which is still a standard authority and in constant use amongst practitioners, as nearly the whole of it is relevant to the present International Court of Justice.

* © Lord McNair, 1962.

The object of all these publications was to make the legal work and output of the League of Nations and its associated institutions more easily accessible to, and better understood by, the public. Their common features are accuracy and reliability and a constant consideration of the kind of instrument that will be useful, and indeed essential, to the worker in this field of law, whether he is a teacher, a researcher or a practitioner. In the same context must be mentioned his *Cases and Other Materials on International Law* (1929, 1936 and 1951) and his share in certain collections of *Nationality Laws* and *Diplomatic and Consular Laws and Regulations*.

Great as the utility of these publications is and will remain, in my judgment his true memorial is the *Harvard Research in International Law*, of which he was the Director during the period of its activity from 1927 to 1939. Regarded both from the scientific point of view and as a triumph of organization, these thirteen Restatements covering a very extensive area of international law have made a weighty impact throughout the English-speaking legal world and, to a less extent, beyond it. Professor Hudson was able to surround himself with a team of rapporteurs and advisers of great distinction, and they produced, within a short period, a series of draft conventions (partly *lex lata* and partly *lex ferenda*) and commentaries, based on an exhaustive examination of the relevant materials—judicial decisions, arbitral awards, treaties, diplomatic dispatches, textbooks and articles. These volumes form, in my opinion, the most important contribution to the systematization of international law in the English language and will remain in regular use for a long time.

Professor Hudson wrote many articles, in particular his annual survey in the *American Journal of International Law* of the work of the Court, and a number of books. Everything that he wrote himself was marked by scholarly care and clarity, but he excelled in inspiring others—pupils and colleagues—to work, in guiding them and moulding them into a team. He was a great teacher and propagandist for international law and interpreter of the League of Nations to the public, and his success was due not only to his intellectual qualities but to his evident and ardent faith in the need of establishing and developing the rule of law amongst nations. (Notices concerning him will be found in *American Journal of International Law*, 54 (1960), pp. 603-4 and the *Proceedings of the American Society of International Law* (1960), p. 223.)

NOTES

THE EUROPEAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION*

By P. I. BENJAMIN¹

ON 21 April 1961 a European Convention on International Commercial Arbitration was signed at Geneva by Austria, Belgium, Bulgaria, the Byelorussian S.S.R., Czechoslovakia, Denmark, the Federal Republic of Germany, France, Hungary, Italy, Poland, Roumania, Turkey, the Ukrainian S.S.R., the U.S.S.R., and Yugoslavia. The Convention was the outcome of a Special Meeting of Plenipotentiaries from twenty-two countries² which met from 10 to 21 April 1961 to consider a draft convention³ that had been drawn up by the *ad hoc* Working Group on Arbitration⁴ of the United Nations Economic Commission for Europe's Committee on the Development of Trade.

Although, as its name indicates, the Convention is primarily an instrument designed to cope with certain difficulties that may impede the organization and operation of international commercial arbitration in relations between European countries, it is open for signature or accession⁵ by any member country of the Economic Commission for Europe (the United States is in fact the only non-European country that is a member of E.C.E.) or by any country admitted to the Commission in a consultative capacity under paragraph 8 of the Commission's terms of reference,⁶ and for accession⁷ by any country entitled to participate in the activities of the Commission under paragraph 11 of its terms of reference.⁸ This paragraph of the Commission's terms of reference has been frequently used in the past to enable non-European countries that are members of the United Nations (e.g. Canada, Israel and Japan) to participate in the work of E.C.E.

The Convention's ten articles are aimed at solving certain questions of a heterogeneous character that constitute obstacles to the use of arbitration as an effective means of settling European trade disputes. Unlike the Convention on the recognition and enforcement of foreign arbitral awards of 10 June 1958 (hereinafter referred to as 'the

* © P. I. Benjamin, 1962.

¹ Assistant Legal Adviser, United Nations Economic Commission for Europe. The views expressed in this article are the writer's personal views and should not be interpreted as those of the Organization.

² The Final Act of the meeting was signed, in addition to the countries referred to above, by Finland, Luxembourg, the Netherlands, Spain, Sweden and Switzerland. Subsequently the Convention was signed by Spain on 14 December 1961 and by Finland on 21 December 1961.

³ Although the United Kingdom played an extremely active part in the *ad hoc* Working Group, it had always refrained from taking part in the drafting of the Convention, largely due to its view that the matters dealt with by Article IV of this Instrument were not suitable for inclusion in an international Convention.

⁴ On this work, see Benjamin, in *International and Comparative Law Quarterly* (1958), p. 22.

⁵ See Article X, paragraph 1. The Convention is open for signature until 31 December 1961 inclusive and thereafter it is open for accession (see Article X, paragraph 3).

⁶ This provision allows the Commission to admit in a consultative capacity European nations not Members of the United Nations, e.g. the Federal Republic of Germany and Switzerland.

⁷ See Article X, paragraph 2.

⁸ 'The Commission shall invite any Member of the United Nations not a member of the Commission to participate in a consultative capacity in its consideration of any matter of particular concern to that non-Member.'

New York Convention') which is mentioned in the Preamble, the Convention is not designed to cope with the recognition and enforcement of awards. The problems dealt with are of two varieties which must be mentioned separately, first, what may be called psychological problems, and secondly, legal problems that may arise prior to the commencement of, during and after arbitration proceedings.

Mention has been made of these two categories of problems in the order referred to because the cornerstone of the Convention is undoubtedly Article IV on the organization of arbitration which is designed to cope with a problem which may or may not have legal consequences, but which is nevertheless psychological. That article, and the Annex to the Convention, are designed to provide a means of perfecting incomplete arbitration agreements where the parties to a commercial contract cannot agree thereon themselves. This is very often the case in trade between countries of different economic structure, but is by no means confined to them, as will be seen below.¹ Among the purely legal problems dealt with, the principal are: the use of delaying tactics during the arbitration by the raising of points of procedure or of substance (Article V); simultaneous proceedings between arbitrators and courts (Article VI); the law to be applied by the arbitrators (Article VII); and the grounds on which an award may be set aside with international effect (Article IX).

Whether dealing with the psychological or the legal problems, the paramount consideration of the draftsmen has been to resolve them whenever possible by recourse to the autonomy of the parties' will. A striking illustration of this technique will be found in the provisions of Articles V and VI,² which, based upon the presumed intention of the parties, endeavour to concentrate in the arbitration proceedings all points of procedure or substance relating thereto without recourse to a court of law. This elimination or reduction of judicial intervention in the case of arbitration, based upon the presumed intention of the parties, also appears in Article IX,³ which reduces to a minimum the number of cases in which an award can be set aside by a court of law with international effect on the validity of the award. Similarly, even in Article IV, the autonomy of the parties' will is the paramount consideration and the mechanism there set up comes into play only when the parties cannot agree.

I. The scope and entry into force of the Convention

The Convention applies to arbitration agreements containing an international element, as well as to arbitral procedures and awards based on such agreements. The international element is twofold, namely the requirement that the arbitration agreement must have been concluded for the purpose of settling disputes arising from international trade, and that it must have been concluded between physical or legal persons having their habitual residence or seat in different contracting States at the time the agreement was concluded.⁴

Thus the Convention will not apply where A and B conclude an arbitration agreement which relates solely to a matter other than international trade (e.g. the valuation of a house in a contract relating to domestic trade). Nor will it apply where A and B reside in the same country when the agreement is made. By implication, the Convention will apply, however, where A and B reside in different countries when they make their arbitration agreement but in the same country when a dispute arises.

As to the criterion of 'habitual place of residence', certain delegations at the Special Meeting of Plenipotentiaries favoured abandoning it in favour of the criterion of

¹ See section II of this note.

³ See pp. 492-4 below.

² See pp. 487-91 below.

⁴ See Article I, paragraph 1.

'domicil', but this was rightly resisted in view of the confusion which the term 'domicil' is likely to engender in an international instrument. The term 'habitual place of residence' is not itself defined, although a suggestion was made that it should be defined. The attempt was abandoned when it became apparent that there might be considerable difficulty in arriving at an acceptable definition, which is hardly surprising in view of the multitude of interpretations that may be given to the above term even within a single system of law.¹

The only terms that are in fact defined in the Convention are the words 'arbitration agreement',² 'arbitration'³ and 'seat'. Although the first two definitions, inspired by the New York Convention, do not call for particular comment,⁴ the use and definition of the term 'seat' requires a moment's consideration. The criterion of 'seat' was adopted in preference to that of 'principal establishment', favoured by a number of delegations, in order to cover the case of an arbitration agreement concluded by a branch office of a firm, and was then defined as 'the place of the situation of the establishment that has made the arbitration agreement'⁵ so as to avoid endless controversy over the respective merits of the place of incorporation or the registered office.

Further points concerning the scope of the Convention are that it does not affect the validity of multilateral or bilateral agreements concerning arbitration entered into by contracting States,⁶ and that reservations are envisaged under one article alone,⁷ namely Article II,⁸ dealing with the right of legal persons of public law to resort to arbitration.

The date of entry into force of the Convention⁹ is the ninetieth day after ratification¹⁰ or accession by five countries who are either members of the Economic Commission for Europe or admitted to the Commission in a consultative capacity under paragraph 8 of the Commission's terms of reference,¹¹ and in the case of countries ratifying or adhering to the Convention later,¹² the ninetieth day after ratification or accession. The

¹ Compare in English law the position under the Income Tax Act, 1952 (15 & 16 Geo. VI and 1 Eliz. II, c. 10) with that under the Exchange Control Act, 1947 (10 & 11 Geo. VI, c. 14).

² See Article I, paragraph 2 (a): 'the term "arbitration agreement" shall mean either an arbitral clause in a contract or an arbitration agreement, the contract or arbitration agreement being signed by the parties, or contained in an exchange of letters, telegrams, or in a communication by teleprinter and, in relations between States whose laws do not require that an arbitration agreement be made in writing, any arbitration agreement concluded in the form authorized by these laws.'

³ See Article I, paragraph 2 (b): 'the term "arbitration" shall mean not only settlement by arbitrators appointed for each case (*ad hoc* arbitration) but also by permanent arbitral institutions.'

⁴ See Article II, paragraph 2, of the New York Convention, which does not, however, include teleprinter messages under the term 'writing', nor envisage the possibility of oral arbitration agreements; see also Article I, paragraph 2, of that instrument giving recognition both to *ad hoc* and to institutional arbitration.

⁵ See Article I, paragraph 2 (c).

⁶ See Article X, paragraph 7.

⁷ The original draft Convention considered by the Special Meeting of Plenipotentiaries did in fact contain an express provision excluding all reservations other than those under Article II (see Article X, paragraph 7, of that draft contained in Document TRADE/WP.1/38). The inclusion of this provision had to be abandoned in view of the desire of the Benelux countries to have inserted in the Final Act of the Special Meeting a declaration whereby they would be free to apply the Convention in whole or in part in their mutual relations (see the Final Act, paragraph 13). The Final Act, however, contains, in paragraph 14, a declaration by the delegations participating in the negotiation of the Convention that, subject to Article II, and to the Benelux declaration just referred to, their respective countries do not intend to make any reservations to the Convention.

⁸ See p. 487, below.

⁹ See Article X, paragraph 8.

¹⁰ Ratification is required under Article X, paragraph 4.

¹¹ See p. 478, n. 6, above.

¹² See Article X, paragraph 8.

Convention contains a procedure for denunciation,¹ and provides that where the number of contracting parties is reduced to less than five as a result of denunciations, it shall cease to be in force from the date on which the last of the denunciations takes effect.²

II. *The organization of arbitration*

The effective use of arbitration as a means of settling disputes arising out of international contracts is often limited by the failure, or the inability, of the parties to agree upon such vital matters as the form that the arbitration is to take (i.e. whether it is to be *ad hoc* or institutional), the way in which the arbitrators are to be appointed, the rules that they are to apply, and last, but not least, where the arbitration is to take place. These disagreements result in so-called 'blank' arbitration clauses, which provide for the settlement of disputes by arbitration but contain no further particulars, or in imperfect arbitration clauses, which deal with some of the matters referred to above but not with others. When a contract does not contain a foreign element, the failure of the parties to agree on these matters does not have dire consequences because recourse can be had to a court to set the arbitration agreement in motion. However, where the contract does contain a foreign element, the position is totally different. Not only is there the possibility of a conflict of jurisdiction between the courts of the two legal systems in question, but it is by no means certain that in all legal systems the courts are able to supplement the arbitration agreement as opposed to treating it as a mere nullity.³

The fact that the difficulty in obtaining agreement on the place and mode of arbitration arises from psychological considerations (i.e. the distrust of having an arbitration in a foreign country) means that it is particularly hard to overcome. Moreover, although this difficulty exists in the case of contracts between persons residing in countries having a similar economic structure, it is less important than it is when the countries have a different economic structure, for in the latter case the distrust is even greater. In the past, various efforts have been made to avoid the difficulty, such as the arbitration facilities set up by the international Chamber of Commerce, the inter-institutional agreements entered into between arbitration centres of countries of similar economic structure,⁴ and certain bilateral conventions⁵ between countries of different economic structure.⁶ Article IV of the present Convention, which deals with the organization of the arbitration, may be said, however, to constitute the first⁷ attempt to solve these problems by means of a multilateral instrument between countries of different economic structure.

The somewhat complex character of Article IV reflects the fact that it was not easy to reach agreement upon a matter in which the difficulties to be overcome were

¹ See Article X, paragraph 9.

² See Article X, paragraph 10.

³ See Benjamin, 'Inter-institutional Agreements Designed to Extend Existing Facilities for International Commercial Arbitration', *International and Comparative Law Quarterly* (1959), p. 289 at p. 291.

⁴ See the previous note.

⁵ A synoptic table of all bilateral conventions containing provisions on commercial arbitration will be found in the *Table of bilateral conventions relating to the enforcement of arbitral awards and the organization of commercial arbitration procedure*, published in 1957 by the U.N. Economic Commission for Europe.

⁶ E.g. the *Treaty of Commerce and Navigation* of 17 August 1946 and the *Protocol* thereto between Denmark and the U.S.S.R., and the *Convention concerning the exchange of goods and payments* of 7 September 1940 and the *Protocol* thereto between Sweden and the U.S.S.R. See also Benjamin, 'Soviet Treaty Practice on Commercial Arbitration since 1940', *American Journal of International Law* (1959), p. 882 at pp. 885 et seq.

⁷ The *ad hoc* Working Group on arbitration of the E.C.E.'s Committee on the Development of Trade has also drawn up the E.C.E.'s Arbitration Rules which are designed to cope with the same problems. However, the rules have not yet been published as they are in the process of being to a certain extent redrafted in the light of the Convention.

primarily due to the reluctance, on the one hand, of western merchants to have arbitrations in eastern Europe and on the other of eastern European State trading organizations to have recourse to western arbitration. Moreover, although Article IV is of general application, and although East-West trade disputes are not referred to by name, it is extremely unlikely that use will be made of Article IV in purely western or purely eastern trade disputes.

The basic mechanism of Article IV is to have recourse to the President of the 'competent Chamber of Commerce' of the respondent's (and in some cases the defaulting party's) habitual place of residence or seat, and a Special Committee of three persons set up under the Annex of the Convention, to determine questions upon which the parties to an arbitration fail to agree, or upon which no action is taken by a party to an arbitration once the arbitration has been set in motion. But before examining how the President of the 'competent Chamber of Commerce' is ascertained and the composition of the Special Committee, it is necessary to say something of the conditions in which Article IV will come into play. Throughout the article a distinction is drawn between the position where the parties to an arbitration agreement have chosen to submit their dispute to an *ad hoc* arbitration procedure, and that where they have chosen a permanent arbitral institution.¹ These two cases must therefore be examined separately,² as must the case where the parties have only been able to agree that the dispute shall be settled by arbitration without specifying whether the arbitration procedure is to be *ad hoc* or institutional.

(a) *Agreement to refer the dispute to an ad hoc arbitration procedure*

Where the parties have agreed upon an *ad hoc* arbitration procedure two problems may still arise: (1) what is to happen if one of the parties fails to appoint his arbitrator, and (2) what is the position where the arbitration agreement contains no indications regarding such matters as the place where the arbitration is to be held and the procedure to be followed by the arbitrators. Under the Convention various provisions will be found that endeavour to afford a solution to these problems which avoids the necessity of recourse to a court of law and thereby prevents any conflict of jurisdiction through two tribunals being seized of the same question. In considering these provisions, it is necessary to bear in mind also the provisions of Article IV, paragraph 1 (b) which states that the parties shall be free, *inter alia*:

- '(i) to appoint arbitrators or to establish means for their appointment in the event of an actual dispute;
- (ii) to determine the place of arbitration; and
- (iii) to lay down the procedure to be followed by the arbitrators.'

As to the first of the two problems, under Article IV, paragraph 2,³ unless otherwise provided, where either party fails to appoint an arbitrator within thirty days of the request for arbitration being made to the respondent, its arbitrator is to be appointed, at the request of the other party, by the President of the competent Chamber of Commerce of the defaulting party's habitual place of residence or seat at the time of the introduction of the request for arbitration.

¹ The right of the parties to choose between these two modes of arbitration is expressly laid down in Article IV, paragraph 1.

² Although the above provision deals first with the case of institutional arbitration, and secondly with the position where the parties have chosen an *ad hoc* procedure, for the purposes of this paper we have reversed the order in which these two questions are dealt with.

³ Also applicable wherever it is necessary to replace an arbitrator (e.g. owing to death or illness, &c.).

Three things should be stressed in connexion with the above provision. First, it must be read in the light of Article IV, paragraph 6, which provides for recourse to the Special Committee where the President of the competent Chamber of Commerce does not appoint an arbitrator when requested. Secondly, paragraph 2 applies both when the respondent fails to designate an arbitrator and also when the claimant fails to do so. It is true that the latter contingency is extremely unlikely to arise in practice, but it may do so, and in that case the provision is somewhat novel in that the arbitration will go on irrespective of the wishes of the party originally setting the arbitration procedure in motion. Lastly, the provision in question once more stresses the autonomy of the parties' will by the words 'unless otherwise provided'. Thus, if the parties to a contract have themselves provided some other mechanism for the appointment of the defaulting party's arbitrator (e.g. by a third person), the provisions of paragraph 2 will not apply.

As to the second problem, where the arbitration agreement does not contain a sufficient indication as to the organization of the arbitration, the autonomy of the will of the parties is once again the paramount consideration, and if the parties can agree upon the organization of the arbitration that will be decisive. Article IV, paragraph 3, however, provides that, if the parties themselves are unable to agree thereon themselves, the necessary steps are to be taken by the arbitrator or arbitrators who have already been appointed. It also provides that where the parties have not been able to agree upon a sole arbitrator, or where the arbitrators they have appointed cannot agree upon the measures to be taken, the claimant is to have the choice of asking that these measures be taken either by the President of the Chamber of Commerce of the place of arbitration agreed upon, or by the President of the competent Chamber of Commerce of the country of the respondent's habitual place of residence or seat at the time of the introduction of the request for arbitration. Where the place of arbitration has not been agreed upon, the claimant has the option of applying for the necessary action either to the President of the Chamber of Commerce just mentioned or to the Special Committee. Moreover, if the claimant fails to exercise his rights, the respondent or the arbitrator(s) are empowered to do so; and finally, the failure of the competent President of the Chamber of Commerce to act gives rise to the possibility of recourse to the Special Committee by virtue of Article IV, paragraph 7.

The option given to the claimant is in many ways the key to the whole system. Faced with the distrust that may exist in the claimant's mind regarding the partiality of the respondent's Chamber of Commerce, the draftsmen of the Convention did not compel the claimant to have recourse to an arbitral institution he may not approve of for the purpose of organizing the arbitration. For it was feared amongst certain industrial circles in the West that recourse exclusively to the respondent's Chamber of Commerce might one day be used by underdeveloped countries as a device to shield them from their defaults on foreign investment contracts.

When recourse is had to the President of a Chamber of Commerce or to the Special Committee, the measures that may be taken by them for organizing the arbitration are four in number:¹ (a) the appointment of the sole arbitrator, presiding arbitrator, umpire or referee;² (b) the replacement of the arbitrator(s) appointed under any

¹ See Article IV, paragraph 4.

² The Special Meeting of Plenipotentiaries took the view that the definition of these terms used by the E.C.E. *ad hoc* Working Group on arbitration should be applied in the future interpretation of the Convention (see Document E/ECE/424/E/ECE/TRADE/47, paragraph 7). These definitions are: 'umpire'—an arbitrator who gives a ruling as sole arbitrator where the two arbitrators appointed by the parties disagree on the merits of the dispute; 'referee'—an arbitrator who gives a casting vote between the other two arbitrators appointed, although he is bound to agree

procedure other than that already referred to under Article IV, paragraph 2 (i.e. the failure of a party to appoint or to replace an arbitrator); (c) the determination of the place of arbitration (the arbitrator(s) being allowed to fix another place of arbitration); and (d) the determination of the procedure to be followed by the arbitrators. With regard to the latter, it is expressly laid down that the procedure may be determined directly, or by reference to the rules and statutes of a permanent arbitral institution, provided always that the arbitrators have not established the procedure themselves, and provided that there has not been any agreement on this question by the parties.

(b) *Agreement to refer the dispute to a permanent arbitral institution*

Where the parties have agreed to refer their dispute to a permanent arbitral institution, it is provided by Article IV, paragraph 1 (a), that the proceedings are to be held in conformity with the rules of the chosen institution. Accordingly, all the complex questions that we have been examining above in connexion with *ad hoc* arbitration are resolved simply by applying the arbitral institution's rules. However, there is another possibility, namely that the parties have agreed that their disputes shall be settled by institutional arbitration but have been unable to agree upon the particular arbitral institution that is to arbitrate. In such a case, Article IV, paragraph 5, provides that the claimant is entitled to request that the institution should be determined in conformity with the procedure of Article IV, paragraph 3, outlined above.

(c) *Arbitration agreements that contain no indication as to the form of arbitration procedure*

Up till now we have been considering cases where the arbitration agreement has provided for either *ad hoc* or institutional arbitration. It is now necessary to consider the case where all that has been done has been to agree to arbitrate. In this case Article IV, paragraph 6, provides that, unless the parties can agree upon the organization of arbitration, recourse may be had by the claimant to the procedure of Article IV, paragraph 3, outlined above, whereupon the President of the competent Chamber of Commerce or the Special Committee is empowered either to refer the parties to a permanent arbitral institution or to ask the parties to appoint arbitrators and to determine the necessary measures for the functioning of the arbitration.¹

(d) *The Presidents of the competent Chambers of Commerce and the election of the Special Committee*

Article X, paragraph 6, provides for the communication to the Secretary-General of the United Nations by contracting parties of a list of Chambers of Commerce or other institutions who will exercise the functions conferred on Presidents of the competent Chambers of Commerce under Article IV. In this connexion two points need underlining. First, it is for the contracting parties alone to determine what bodies in their respective countries are to be competent and secondly, there is nothing to prevent a contracting party designating several different bodies. The latter contingency may well arise with regard to Western countries where the pattern of international commercial institutional arbitration is such that within these countries there is not a single

with one of the opinions expressed by the arbitrators who disagree on the merits of the dispute; 'presiding arbitrator' an arbitrator who forms with the other arbitrators an odd-numbered collegium over which he presides.

¹ Where the decision is that the arbitration should be *ad hoc*, the provisions of Article IV, paragraphs 2, 3 and 4, will apply. Moreover, the provisions of paragraph 7 of that article providing for recourse to the Special Committee should the President of the Chamber of Commerce fail to act apply equally to paragraph 6 which has just been considered.

Chamber of Commerce designed to provide arbitration facilities for external trade, as is the case in eastern Europe,¹ but often a large number of specialized bodies offering arbitration facilities in different fields of trade (e.g. rubber, cereals, cotton, engineering equipment, &c.) as well as different Chambers of Commerce providing arbitration facilities in provincial towns.² Thus, were Sweden to adhere to the Convention, there would be nothing to prevent the Swedish Government from designating the Swedish Institute of Technical and Industrial Arbitration for disputes concerning the engineering trade, and the Stockholm Chamber of Commerce for other forms of dispute. Similarly, were the United Kingdom one day to become a party to the Convention, there would be nothing to prevent its designating the London Court of Arbitration where a party to an arbitration agreement has its habitual residence or seat in London, and the Tribunal of Arbitration of the Manchester Chamber of Commerce where it has its habitual residence or seat in Lancashire. However, it is once more stressed that the decision to designate more than one body for the mechanism of Article IV is entirely a matter for each country to decide when signing, adhering to or ratifying the Convention, and that should a country designate more than one institution it will likewise be for that country to specify the geographical area or the subject-matter in respect of which each designated institution will be competent.

The Chambers of Commerce (or other institutions) have yet another function, namely the election of the Special Committee referred to in Article IV, whose composition and procedure are dealt with in the Annex to that article.

It is provided by paragraph 1 of the Annex that the Special Committee shall consist of two ordinary members and a chairman. Each of the ordinary members is elected for a term of four years, one of them by the Chambers of Commerce or other institutions designated by virtue of Article X, paragraph 6 of the Convention, of States parties³ to the Convention on 31 December 1961⁴ that have National Committees of the International Chamber of Commerce, and the other by the Chambers of Commerce, &c., of States parties to the Convention on the above date that do not have such Committees.⁵ As to the chairman, although each of the two groups of Chambers of Commerce, &c., elect a chairman,⁶ the office of chairman rotates every two years between the nominees of these two groups.⁷

These two groups of Chambers of Commerce reflect the fact that as already mentioned, Article IV was drawn up with East-West trade disputes in mind. The expression 'National Committees of the International Chambers of Commerce' is in fact a diplomatic drafting device, since all the countries of western Europe and Yugoslavia have such committees, whereas the countries of eastern Europe are not members of the I.C.C. and therefore do not have National Committees.

¹ On arbitration bodies in eastern Europe see Benjamin, 'Aperçu des institutions arbitrales de l'Europe de l'Est', *Revue de l'arbitrage* (1957), pp. 114 et seq. and (1958), 2 et seq.

² For a complete list of arbitral bodies in Europe and the United States active in the field of international commercial arbitration, see *The Handbook of National and International Institutions Active in the Field of International Commercial Arbitration* issued by the U.N. Economic Commission for Europe in 1958. For a comparative survey of international commercial institutional arbitration see Benjamin, 'A Comparative Survey of International Commercial Institutional Arbitration in Europe and in the United States of America', in *Arbitrage commercial international*, Union Internationale des Avocats, vol. 2, pp. 350 et seq.

³ By virtue of the Annex, paragraph 4, Chambers of Commerce designated by signatory States not yet parties to the Convention are allowed to participate in these first elections.

⁴ The date until which the Convention is open to signature (see Article X, paragraph 3).

⁵ Although the Convention does not say expressly that in the election of the Special Committee each country has only one vote, such was the intention of the draftsmen.

⁶ See the Annex, paragraph 2.

⁷ See the Annex, paragraph 7.

Where recourse is had to the Special Committee under Article IV, it is provided that the request for the necessary action will be made to the Executive Secretary of the United Nations Economic Commission for Europe who will refer the matter to the member of the Special Committee elected by the group of countries other than that by which the chairman holding office at the time of the request was elected.¹ The proposal made by such member is then communicated to the other members of the Special Committee. If the proposal is accepted, it is provided that it shall be deemed to be the ruling of the Special Committee. However, should the proposal be rejected, provision is made for the convening of a meeting of the whole Special Committee in Geneva with a view to arriving at a unanimous decision, failing which the Committee's decision will be given by a majority vote.²

Such then is the basic system to be found in the Annex to the Convention;³ and one may be tempted to ask why the third member of the Special Committee should be designated by either West or East, rather than a neutral jointly appointed, and how this system is likely to avoid the chairman giving rulings in favour of the arbitral bodies that elected him during his two-year term.

The reason for the tripartite structure of the Special Committee, giving a predominant voice every two years to the nominees of Chambers of Commerce in western or eastern Europe, is that at the present day from the point of view of commercial arbitration neutrality cuts across traditional political frontiers, and there is in consequence no such thing as an arbitral body, chamber of commerce, &c., that is not part and parcel of the economic system in which it is set up. Thus from the point of view of East-West trade arbitration the traditionally neutral countries politically such as Sweden and Switzerland are considered as Western and not as neutral. For this reason, the draftsmen of the Convention decided that the Special Committee⁴ should be composed in the manner described. The same result would, of course, have been obtained by the constitution of a two-member Special Committee with one of these members having the decisive vote for two years, and the other for the next two years. This possibility was in point of fact examined, but rejected as psychologically unsound.

There remains the question how the system is to prevent the chairman ruling in favour of the interests that elected him. Quite apart from the fact that such conduct would be incompatible with the high standards expected of the person nominated as chairman, there is the likelihood of retaliation by the other chairman once the biased chairman's two years of office is up. Furthermore, the role given in the Annex to the Executive Secretary of the United Nations Economic Commission for Europe is another factor that must be taken into consideration when attempting to forecast whether the system established by the Convention will work, and work fairly. For it is

¹ See the Annex, paragraph 8.

² See the Annex, paragraph 9.

³ Where provision is *inter alia* made for: the election of alternates in cases where the chairman or the regular members are unable to act (see paragraph 3); the holding of the first (see paragraph 4) and subsequent elections (see paragraph 5); for the communication of the results of the elections to and by the Secretary-General of the United Nations (see paragraph 6); for the determination by lot which of the chairmen shall exercise the office of chairman for the first two-year period (see paragraph 7); and for the expenses connected with the Special Committee's action being advanced and considered as costs in the cause (see paragraph 10).

⁴ Prior to accepting the Special Committee system various other schemes were examined and abandoned for one reason or another, e.g. designation by the respondent's Chamber of Commerce, the Secretary-General of the United Nations, the Executive Secretary of the U.N. Economic Commission for Europe, the Chairman of the Committee on the Development of Trade of the U.N. Economic Commission for Europe, the President of the International Court of Justice, &c.

clear that every effort will be made to obtain a unanimous decision of the Special Committee.

III. *Problems that may arise prior to the commencement of arbitration proceedings*

At the outset of this note we mentioned that in addition to the psychological difficulty in regard to the organization of arbitration, the Convention endeavoured to afford solutions to a number of specific legal problems. We shall now consider the first category of these problems, which belong to the stage prior to the commencement of arbitration proceedings. They are, however, problems which only arise in a limited number of countries; it is not therefore proposed to dwell on them at any length.

(a) *The right of legal persons of a public law character to resort to arbitration*

The fact that in certain countries (e.g. Belgium, France,¹ Greece and in some States of the U.S.A.) public corporate bodies are not allowed to enter into arbitration agreements led the draftsmen of the Convention to insert Article II which expressly recognizes the right of these bodies to conclude valid arbitration agreements.² The question may then be put as to the effect of this article in English law with regard to arbitration agreements entered into by State trading organizations, if the United Kingdom should one day adhere to the Convention. It is at least arguable that in such a contingency decisions like *Duff Development Co. v. Kelantan Government*³ would no longer be possible, and that a plea of State immunity would not be valid in the case of a valid arbitration agreement dealing with commercial arbitration having been entered into by a foreign State or a State trading organization of such a State that is a party to the European Convention.

(b) *The right of foreign nationals to be designated as arbitrators*

In certain European countries (e.g. in Greece, Italy, Portugal and Spain) existing legislation prevents foreigners from becoming arbitrators, and in consequence Article III (which affirms the right of foreign nationals to be designated as arbitrators) was inserted in the Convention in order to bring the legislation of these countries into harmony with that of the vast majority of countries.

IV. *Problems that may arise during arbitration proceedings*

The problems dealt with by the Convention that may be said to fall in this category are three in number, namely pleas as to the jurisdiction, the law that must be applied by the arbitrators and whether reasons must be given for the award.

(a) *Pleas as to the jurisdiction*

The importance attached to the autonomy of the parties' will by the draftsmen of the Convention was regarded by them as calling for the reduction to a minimum of the number of cases in which arbitration proceedings may be interrupted by the raising of pleas as to the jurisdiction. The underlying premiss upon which the provisions dealing

¹ In France some of these arbitration agreements have nevertheless been held to be valid. See Robert, *Traité de l'arbitrage* (1955), pp. 26 et seq.

² Article II, paragraph 2, provides: 'On signing, ratifying or acceding to this Convention any State shall be entitled to declare that it limits the above faculty to such conditions as may be stated in its declaration.' We have seen above that this is the only provision in the Convention where the possibility of a contracting party making a reservation is expressly provided for.

³ (1924), A.C. 797.

with pleas as to the jurisdiction are based is that where there is an arbitration agreement, the intention of the parties is that their disputes should be determined under this agreement. From this it follows that it would be contrary to the intention of the parties that such an agreement should be vitiated by vexatious pleas as to the arbitrators' jurisdiction, or that pleas as to the arbitrators' jurisdiction should be made not before the arbitrators but before a court of law. Each of these points will now be examined in turn.

(i) *Pleas as to the arbitrators' jurisdiction.* Article V of the Convention endeavours to secure the smooth flow of arbitration proceedings by preventing the raising of points of procedure throughout the arbitration by a party who appears to be losing in an endeavour to delay the rendering of an award, and by estopping a party who has failed to challenge the jurisdiction of the arbitrators during the arbitration, from doing so during subsequent court proceedings concerned with the substance of the dispute or with the enforcement of the award. In addition, the above article allows an arbitrator whose jurisdiction is challenged to proceed with the arbitration and to determine whether he has jurisdiction. Such are the basic provisions of Article V, and it will be seen that they aim at avoiding the arbitration proceedings being interrupted by the recourse to a court of law on the question of the arbitrators' jurisdiction. This solution may perhaps surprise the common lawyer who is accustomed to seeing courts of law exercising with discretion their supervisory power over arbitration proceedings, but it must be borne in mind that in countries where arbitration is less developed, arbitration is still regarded with an element of suspicion by the courts who may thus be inclined to exercise their powers of supervision with less discretion.

Article V¹ distinguishes between two different categories of pleas relating to the arbitrator's jurisdiction. First, it is provided that pleas based on the fact that the arbitral agreement was either non-existent, null and void, or had lapsed, must be made during the arbitration proceedings and not later than the delivery of the statement of claim or defence of the party making the plea. Secondly, pleas based on the fact that the arbitrator has exceeded his terms of reference have to be made immediately during the arbitration proceedings as soon as the matter which raises the question of an excess of jurisdiction arises.²

Under paragraph 2 of Article V a party that fails to raise a plea within these time-limits is precluded from raising it either at any subsequent stage of the arbitration proceedings or during subsequent court proceedings concerned with the substance or enforcement of the award, unless the point of jurisdiction is one that must be raised *ex officio* by the arbitrators or by the court. Where the plea is one that is left to the parties' discretion to raise, in the case of pleas made during the arbitration proceedings, by the law applicable by the arbitrators,³ or, in the case of pleas made before a court, by the conflicts rule of the court seised of the substance of the dispute or enforcement of the award, failure to raise the plea in due time debars the party concerned from ever raising it at all. These provisions of Article V, paragraph 2, recognize that the two hypotheses in which pleas as to the jurisdiction may be made, i.e. during or after the arbitration proceedings, are different and as such allow of different solution. For it appeared logical to the draftsmen of the Convention to refer to the rule of conflict of the court seised; when the plea was made after the arbitration had been concluded, it

¹ See paragraph 1.

² With regard to both categories of plea the arbitrator is allowed to admit a plea which is out of time where the delay in raising the plea is due to a cause which he deems to be justified, and the arbitrators' decision is subject to judicial control.

³ This term will be considered under sub-section (b) below.

appeared to them to be less desirable to have recourse to the law applicable by the arbitrator when the plea as to the jurisdiction is made during the arbitration.

It should be mentioned that the estoppel provided for under Article V, paragraph 2, with regard to subsequent court proceedings, fills a gap in the provisions of Article V of the New York Convention which, save as regards the burden of proof, say nothing of the circumstances in which the various grounds for setting aside an award may be invoked. The question is now resolved at any rate with regard to contracting parties to the European Convention.

The provision in the final paragraph of Article V to which we have already alluded allows an arbitrator whose jurisdiction is challenged to proceed with the arbitration, to rule on his own jurisdiction and to decide upon the existence or the validity of the arbitration agreement or of the contract of which the agreement forms part but makes the arbitrator's rulings subject to any subsequent judicial control provided for under the *lex fori*. The provision reflects the clash between two considerations. First, the general view that it was in the interest of the development of arbitration that proceedings should not be held up by reason of the arbitrators having to wait for a court to decide upon their jurisdiction should one of the parties raise a plea relating thereto. Secondly, the fact that although under certain legal systems (e.g. the German) it is possible to oust entirely the right to seise a court of the question whether or not the arbitrators have got jurisdiction under others (e.g. the Dutch and the English) this is not possible. Consequently, the Convention allows an arbitrator whose jurisdiction is challenged to proceed with the arbitration and to rule on his jurisdiction, subject to there being a right of recourse to a court thereafter if such a right is recognized by the *lex fori*. These provisions of Article V, paragraph 3, must, however, also be read in the light of Article VI, paragraph 3, covering the plea of *lis alibi pendens*, which will be examined in the next section.

(ii) *The jurisdiction of courts of law where there is an arbitration agreement.* The effect of starting proceedings in a court regarding matters on which there exists a valid arbitration agreement is dealt with under Article VI which once again goes somewhat further than do the provisions of the New York Convention, which on this point require the court, at the request of one of the parties, to refer the parties to arbitration unless the agreement in writing¹ is null and void, inoperative or incapable of being performed.² These provisions do not specify either at what stage of the court proceedings the existence of the arbitration agreement must be invoked or under what law the validity or existence of such agreement must be examined³—questions which are, however, covered by the European Convention.

Under the Convention a plea as to the existence of an arbitration agreement must be made by the respondent before presenting his substantial defence where the court seised regards this plea as one of procedure, and at the same time as the presentation of the substantial defence where such court regards the plea as one of substance.⁴ In both cases the failure to raise the plea within the time-limits operates as an estoppel.

As to the law which must be applied to determine the existence or the validity of the arbitration agreement, Article VI, paragraph 2, distinguishes between cases where the point at issue is the capacity of the parties when the law applicable to the parties will be applied (i.e. the law of nationality or that of domicile according to the rules of conflict

¹ For a definition of this term see Article II, paragraphs 1 and 2, of the New York Convention.

² See Article II, paragraph 3, of the New York Convention.

³ Detailed provisions on this point will be found, however, at the recognition and enforcement stage under Article V of the New York Convention.

⁴ See Article VI, paragraph 1.

of the *lex fori*), and cases where the point at issue involves some other question, when the law to which the parties have subjected their arbitration agreement will be applied. Where there is no indication as to this law, it is provided that the law of the country in which the award is to be made will be applied, unless it is impossible to determine where the award is to be made at the time when the plea is raised, in which case the conflicts rules of the court seised of the dispute will be applied.¹

Thus, apart from the case where the existence or validity of the arbitration agreement depends upon the capacity of the parties, an extremely important place is once again given to the principle that all questions related to an arbitration should as far as is possible be governed by the autonomy of the parties' will.

The problem of *lis alibi pendens* is dealt with under Article VI, paragraph 3, which provides:

'Where either party to an arbitration agreement has initiated arbitration proceedings before any resort is had to a court, courts of Contracting States subsequently asked to deal with the same subject-matter between the same parties or with the question whether the arbitration agreement was non-existent or null and void or had lapsed, shall stay their ruling on the arbitrator's jurisdiction until the arbitral award is made, unless they have good and substantial reasons to the contrary.'²

When examining the provisions of Article V, paragraph 3, enabling an arbitrator to proceed with the arbitration notwithstanding the fact that his jurisdiction was challenged, mention was made of the fact that although under certain systems of law it is possible to oust the parties' right of recourse to a court of law on the question of the arbitrators' jurisdiction, under other systems of law this is impossible, and that this difference finally resulted in the compromise provision that arbitrators may continue with the arbitration, subject to the right of recourse to a court thereafter where the *lex fori* recognizes such right. This difference between the two systems of law is equally reflected in the provisions of Article VI, paragraph 3, which is also a compromise between delegations who wished arbitration proceedings automatically to put a stop to the possibility of seising a court of law of the same question until the end of such proceedings, and delegations who felt that in their countries the possibility of concurrent arbitral and judicial proceedings had not given rise to difficulty in practice.

Mention must also be made of the fact that the *ad hoc* Working Group that drew up the first draft of the Convention at one time contemplated inserting a provision whereby the decision of any court seised of the substance of the dispute regarding the validity of the arbitration agreement should operate as *res judicata* on all arbitration bodies or courts of law subsequently seised of any question relating to the arbitration agreement, as well as on all courts called upon to give a ruling on the recognition or enforcement of an award arising from the arbitration agreement in question. This proposal was, however, abandoned since it was generally felt that the proposed provision might adversely affect the growth of arbitration, for it might open the door to fraudulent manœuvres by a party wishing to have an award set aside. In particular, given the differences that exist from country to country on the jurisdiction of courts, such a provision might enable a dishonest party to start proceedings before a court of a country having no connexion with the arbitration agreement and there get a judgment setting aside the

¹ Article VI, paragraph 2, also allows the non-recognition of the arbitration agreement if, under the law of the court seised, the dispute is not capable of settlement by arbitration.

² A request for interim measures or measures of conservation addressed to a judicial authority is not to be regarded as incompatible with the arbitration agreement or regarded as a submission of the dispute to court (see Article VI, paragraph 4).

award with the result that proceedings by the other party to get the award enforced in countries with which the dispute was closely connected would be completely fore-closed.

(b) *The law to be applied by the arbitrators*

The autonomy of the parties' will is once more expressly recognized in the provisions of Article VII of the Convention dealing with the law that must be applied by the arbitrators to the substance of the dispute. Article VII provides:

'1. The parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute. Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable. In both cases the arbitrators shall take account of the terms of the contract and trade usages.

'2. The arbitrators shall act as *amiables compositeurs* if the parties so decide and if they may do so under the law applicable to the arbitration.'

The novel feature of these provisions is that the possibility of having an arbitration agreement largely, or wholly, divorced from any system of municipal law is expressly recognized, and from the point of view of the growth of international commercial arbitration the importance of that great possibility need hardly be underlined.

During the preliminary spade-work on the Convention, a considerable current of opinion was found to exist in favour of allowing the parties to an arbitration agreement to free the arbitrators from observing the substantive provisions of any system of municipal law and to be guided solely by the terms of the contract and trade usages.¹ In the course of this work it transpired that the cleavage between legal systems that appear to refuse to allow the arbitrators to disregard the rules of municipal law if the parties have so provided, and legal systems in which this is possible, is not as great as appears at first sight. In particular, it would seem that under nearly all systems of law considerable liberty is given to the parties to contract out of a large number of provisions of municipal law, save, of course, those that are so intimately connected with public policy that they cannot be disregarded by the arbitrators. Thus even in English law, although it is impossible to provide that the arbitrators should not observe all the rules of English law where the proper law of the contract is English and there is an arbitration agreement² within the meaning of the Arbitration Act, 1950,³ it is possible to free the arbitrators from the observance of certain rules of strict law, such as empowering the arbitrators to award whatever damages they deem to be appropriate. Conversely, under the system of *amiable composition*, which may seem at first sight to be a means of avoiding the application of the provisions of municipal law, it would appear that under Belgian, Dutch and French law, *amiables compositeurs* nevertheless continue in general to decide in accordance with the rules of municipal law, owing to the fact that they are required to give reasons for their award. Under these systems of law arbitrators resort to *équité* (natural justice) solely where it appears to be vital to do so to avoid undue hardship which would follow from a strict application of the law.

¹ The advantages of such a system was stressed as far back as 1932 by no less an authority than Professor René David. (See his *Rapport sur l'arbitrage conventionnel en droit privé*, published by the Institute for the Unification of Private Law, at p. 106.)

² See the Arbitration Act, 1950, Section 32.

³ *Sed quaere* whether a contract could not be so drafted as to indicate that although the parties contemplated the creation of legal obligations, these obligations should not arise until the 'arbitrator' deciding untrammelled by any rules of law has given his award. Such an arrangement would presumably not be an arbitration within the usual meaning of the word, and the provisions of the Arbitration Act, 1950, would probably not then apply.

The above considerations led the draftsmen of the Convention to provide that in both the hypotheses mentioned by Article VII, paragraph 1 (i.e. where the parties indicate what is the applicable law, and where the arbitrators apply the proper law under the rule of conflict that they deem applicable) the arbitrators shall take into account the terms of the contract and trade usages. It will be observed that the formula used is an extremely cautious one. In particular there is no express categorical declaration that the parties are entitled to instruct the arbitrators to disregard the provision of municipal law. Instead it is provided that account shall be taken of the terms of the contract and trade usages. However, in all arbitrations covered by the Convention, if the terms of the contract or the trade usages empower the arbitrators to disregard the application of the provisions of municipal law, it would seem that the arbitrators will be entitled to do so. This is at first sight a startling innovation but one which may be felt to be in the interests of the development of international commercial arbitration.

(c) *Reasons for the award*

Article VIII is designed to cope with the traditional old chestnut of international arbitration, namely whether or not arbitrators must give reasons for their award. In view of the cleavage that exists between legal systems in which arbitrators are required to state the reasons for their award (e.g. *inter alia*, the Bulgarian, German, Italian and Polish) and those in which this practice is not usual (e.g. *inter alia* the Danish and English) the Convention adopts an intermediate solution. The parties are to be presumed to have agreed that arbitrators shall give reasons for their award unless either the parties expressly declare the contrary, or choose an arbitral procedure under which it is not customary for the arbitrators to give reasons, provided that neither party requests before the end of the hearing, or if there has not been a hearing then before the making of the award, that reasons be given. An example of the latter hypothesis would be an arbitration in Italy held according to English law. In such a case the arbitrators would not give reasons.

V. *Problems that may arise after the conclusion of arbitration proceedings*

One problem alone dealt with by the Convention may be said to fall under the above heading, namely when an award may be set aside in a contracting State with international effect in another contracting State. Article IX of the Convention, which deals with this problem, endeavours to restrict to a minimum the number of cases in which an award may be set aside with international effect. However, before examining these cases something must be said of the development of international arbitration within the last quarter of a century, for the provisions of Article IX are the logical outcome of an evolution in which the attitude taken by countries towards foreign arbitration awards has become more liberal than in the past.

When the Geneva Convention on the execution of foreign arbitral awards was signed in 1927, international commercial arbitration had not reached the proportions it was to assume in subsequent years, and consequently that Convention was extremely restrictive in many respects, and somewhat timorous in others. In particular, mention must be made of the large number of grounds on which the recognition or enforcement of foreign awards can be refused.¹ In practice the technique utilized by the draftsmen of the 1927 Convention was to require that the party seeking to enforce an award should prove that it could be enforced, and to transpose into the international field the sum

¹ See Articles I and II.

total of all the grounds on which an award could be set aside under the municipal laws of all the contracting parties.¹

This somewhat restrictive attitude to international arbitration is in sharp contrast to that adopted by the New York Convention, where the burden of proof is generally shifted from the party seeking to obtain the recognition or enforcement of an award to the party which is resisting it.²

However, since the New York Convention was concluded with the object of facilitating the recognition and enforcement of foreign arbitral awards, it did not deal with the question when an award may be set aside, but solely with the question when the recognition and enforcement of an award may be refused. But the situation may well arise in which an award has been set aside in State A (a non-contracting State) on grounds that do not constitute grounds for the setting aside of awards in the municipal legislation of any of the contracting States to the Convention, with the consequence that such an award cannot be enforced in any contracting State.³ This was one of the difficulties that the draftsmen of the European Convention bore in mind when Article IX was drawn up.

Under Article IX, paragraph 1, the setting aside of an award in a contracting State only constitutes a ground for the refusal of recognition or enforcement in another contracting State when the proceedings setting it aside have taken place in the State in which, or under the law of which,⁴ the award has been made and when it has been set aside for one of the following reasons:

- (a) the parties to the arbitration agreement were under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- (b) the party requesting the setting aside of the award was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present his case; or
- (c) the award deals with a difference not contemplated by, or not falling within the

¹ This technique has unfortunately been followed in the Preliminary draft Uniform law on arbitration, drawn up at the Council of Europe. Although this law (which is designed to unify the municipal legislation on arbitration of the member States of the Council of Europe) is not yet in its final form, mention must be made of the fact that it contains an inordinately lengthy list of cases in which an award may be set aside. It is to be hoped that this list will be revised when the final draft of this law is prepared.

² Under Article V, paragraph 1, of the New York Convention, the party seeking to block the recognition and enforcement must furnish proof of the existence of a ground for refusal mentioned in that paragraph. However, under Article V, paragraph 2, of that Instrument there are two cases in which this solution is not adopted and in which recognition and enforcement may be refused, namely where the competent authority of the country in which recognition and enforcement is sought finds that the subject-matter of the difference is not capable of settlement by arbitration under the law of that country; or where the recognition or enforcement would be contrary to the public policy of that country.

³ See Article V, paragraph 1 (e), under which it is provided that 'Recognition and enforcement of an award may be refused, at the request of the party against whom it is invoked, only if that party furnishes proof . . . that (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made'.

⁴ During the Special Meeting of Plenipotentiaries certain delegations unsuccessfully endeavoured to have inserted a provision stating expressly that the reference to the law under which the arbitral award was made should be construed as a reference to the law governing the arbitration proceedings. Although this interpretation was accepted by the Special Meeting it was decided to keep the wording of the New York Convention in view of the confusion which might otherwise arise.

terms of, the submission to arbitration, or where it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration need not be set aside; [or]

- (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, with the provisions of Article IV. . . .¹

Sub-paragraphs (a), (b) and (c) above in point of fact reproduce almost word for word the first three grounds on which the recognition and enforcement of awards may be refused under Article V, paragraph 1, of the New York Convention. Sub-paragraph (d) above, however, differs from Article V, paragraph 1 (d), of the New York Convention, in which the ground for refusal of recognition and enforcement is that 'the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.'

Under the European Convention there are therefore no cases other than those just mentioned in which an arbitral award may be set aside with international effect,¹ and in particular no mention is made of public policy, which is remarkable when one considers the passions that are sometimes roused by these words. It is submitted that the absence of such a mention is to be welcomed, for it would have been completely illogical to have provided for public policy as a ground for the setting aside of an award with international effect. Otherwise the situation might well arise in which an award made in State A, between nationals of State B and State C, which was to be enforced in either State B or C, could not be because it had been set aside in State A as violating public policy, and notwithstanding the fact that the award was not contrary to the public policy of either State B or C. Such an hypothesis is far from theoretical when one considers the importance in international commercial arbitration of having awards rendered in a neutral country.

Before leaving this account of Article IX, mention must be made of paragraph 2 of this article which provides that in relations between contracting States that are also parties to the New York Convention, the various provisions of Article IX, paragraph 1, which have just been considered, limit the application of Article V, paragraph 1 (e), of the New York Convention² solely to the cases of setting aside mentioned under Article IX, paragraph 1.

VI. Conclusion

It is always dangerous to attempt to draw conclusions regarding a legal instrument that has not entered into force and that has not weathered the test of years, and for this reason, the lines that follow should be regarded more as a postscript to the preceding pages than an endeavour to assess the role of the European Convention in providing an effective solution to the problems of international commercial arbitration.

¹ Certain delegations present at the Special Meeting of Plenipotentiaries endeavoured to add 'fraud' to these cases. However, in view of the fact that 'fraud' is covered implicitly by the provisions of Article IX, paragraph 1 (d), the inclusion of fraud as a separate case was felt to be unnecessary. In addition an unsuccessful attempt was made to insert in Article IX, paragraph 1 (c), a provision that a 'mistake of law' should not constitute a ground for the setting aside of an award with international effect. Such a provision was, however, felt to be completely redundant since in the view of the draftsmen of the Convention it was implicit that a mistake of law could not justify the setting aside of an award with international effect.

² Cited under n. 3, p. 493, above.

The Final Act of the Special Meeting of Plenipotentiaries that negotiated and signed the Convention contains three Recommendations relating to the matters covered by Article IV. The first is that parties to an arbitration agreement should insert therein an indication as to the place and method of arbitration. The second Recommendation is that the various General Conditions of Sale drawn-up under the auspices of the Economic Commission for Europe should no longer have a 'blank' arbitration clause, which has been the case in view of the deadlock reached on this question owing to the psychological factors of which mention has repeatedly been made.¹ The final and last Recommendation is that consultations should be held both by the Special Committee and by the Chambers of Commerce and other institutions having a role to play under the Convention with a view to taking all necessary measures for the application of the Convention and for the development of arbitration.

That all three Recommendations relate to Article IV of the Convention bears witness to the fact that ultimately the success or failure of the Convention to achieve its object will be judged by that article alone. That at the present day it was possible, after many years of discussion, to reach agreement between countries of different economic and political structure on a matter where the difficulties to be overcome were psychological is perhaps all the more noteworthy. However, it may be doubted whether in the long run the complex mechanism of Article IV will be resorted to in practice, for as mutual confidence grows with regard to foreign arbitration, the difficulty of reaching agreement on the matters dealt with under Article IV will tend to disappear and recourse to that article may in consequence become unnecessary. Should this occur, Article IV will nevertheless have achieved its object which is to further the use of arbitration as a means of settling international trade disputes.

Throughout the above pages, the importance given in the Convention to the autonomy of the parties' will has been stressed. The role given to the will of the parties appears to us to be a capital factor in the development of international commercial arbitration, and to reflect contemporary practice.² The growth of international commercial arbitration depends upon arbitration being able to offer a procedure for settling disputes that differs from proceedings before a court of law,³ and more especially in the degree to which the will of the parties is allowed to determine the course of the arbitration.

¹ For an account of these optional instruments drawn up for different trades see Kopelmanas, 'La Codification des coutumes du commerce international dans le cadre des Nations Unies', *Annuaire français de droit international* (1955), p. 270; Tunc, 'L'Élaboration de conditions générales de vente sous les auspices de la Commission Économique pour l'Europe', *Revue internationale du droit comparé*, 1 (1960); Benjamin, 'The ECE General Conditions of Sale and Standard Forms of Contract', *Journal of Business Law* (1961), p. 113.

² See Kopelmanas, 'The Settlement of Disputes in International Trade', *Columbia Law Review* (1961), p. 384.

³ See René David, 'Arbitrage et droit comparé', *Revue internationale de droit comparé* (1959), p. 1.

THE *SANTA MARIA*: REBELS OR PIRATES*

By PROFESSOR L. C. GREEN

THE controversy between Dr. Salazar and General Delgado had as its most dramatic manifestation the seizure in 1961 on the high seas of the Portuguese liner *Santa Maria*, which gave rise to a very interesting problem of the relation between insurgency and piracy in modern international law.

Among the passengers who boarded the liner at two of her ports of call was a number of persons who subsequently, under the leadership of a Portuguese political dissident, Captain Galvão, took over the liner by armed force. In the course of the seizure one of the ship's officers was killed, while other members of the crew, including the captain, were placed under armed guard. At first blush, this incident would appear to fall four-square within the popular conception of piracy. The situation was complicated, however, by the fact that Captain Galvão gave the seizure what appeared to be a political complexion by describing it as 'the first step aimed at overthrowing the Dictator Salazar of Portugal'.¹ His declaration was controverted by the Portuguese Government, which denounced the captors as 'outlaws', denying that they were either 'politicians or ideologists'.² This ignores Captain Galvão's announcement that the vessel had been seized 'in the name of the international junta of Liberals presided over by General Humberto Delgado, president-elect of the Portuguese Republic, fraudulently deprived of his rights by the Salazar Government';³ Delgado had been defeated in the Portuguese presidential election of 1958.

In recent days it has been the practice of the Western powers not to intervene in insurrections which tend to be regarded as internal affairs. In this case, however, British, Dutch and United States warships were instructed to seek the vessel. The Civil Lord of the Admiralty explained that, in response to a request from the Government of Portugal, 'a recognized, friendly and allied government', the Senior Naval Officer in the West Indies had been instructed to arrest the *Santa Maria*, 'provided contact was gained outside territorial waters and it could be done by peaceful means without loss of life or risk of scuttling'.⁴ The ban on the use of force implies that the Government had doubts whether an act of piracy had been committed, and, although one of his questioners expressly used the term, the Civil Lord declined to be led. Naval authorities in the United Kingdom, however, were not so reticent. The Director of the Operations Division of the Admiralty stated that 'any warship may take such action as it can to bring pirates to book; the only point is that the chap in charge is answerable to the Government whose flag the ship is flying if he cannot substantiate the charge of piracy'.⁵

The attitude of the United States was similar to that of the Admiralty, only the State Department appeared to have no reservations as to the nature of the seizure. The spokesman for the Department explained that the United States had agreed to help Portugal to recover the *Santa Maria* 'in accordance with the well defined terms of international law governing piracy and insurrection on board ship'. He explained that the object of the operation was the protection of passengers and crew and the restoration of the ship to her rightful owners.⁶

* © Professor L. C. Green, 1962.

¹ *The Times*, 25 January 1961.

² *Ibid.*

³ *Ibid.*

⁴ House of Commons, 24 January 1961 (*Hansard*, vol. 633, cols. 32, 35).

⁵ *The Times*, 25 January 1961.

⁶ *Ibid.*

It is perhaps unfortunate that the spokesman used the word 'insurrection' in this context, for one of the problems in determining the status of Captain Galvão and his party is whether they were in fact insurrectionists. Mr. Lincoln White probably meant by this term nothing more than mutiny. Neither mutiny nor insurrection at sea is an offence which by international law is within the jurisdiction of any State other than the flag State. Neither issue is dealt with by Colombos nor mentioned by Brittin in his *International Law for Seagoing Officers*, which was published by the United States Naval Institute. It is true that Hackworth deals with mutiny, but he does so only in so far as United States vessels or seamen are concerned. Insurrection is not dealt with in any of the books, save as part of the wider problem of insurgency. On the other hand, mutiny on the high seas is normally considered an extraditable offence. However, extradition is only possible when the wanted person is within the territorial jurisdiction of the State to which the request is addressed. While both English¹ and United States² courts are not concerned with the methods by which an accused is brought within their jurisdiction, it would be a new interpretation of the principle of the freedom of the seas to allow a State organ to seize a person on a foreign ship on the high seas in order to subject him to extradition proceedings. Further, the sole result of this would be to change the nature of the problem to be decided. Instead of the executive having to decide whether an insurrection was in existence, the court would have to decide whether the fugitive was a political offender.

It was not only the Governments of Portugal's allies which considered the seizure of the *Santa Maria* in the light of piracy. Shipping interests tended to proclaim piracy in every comment that they made. There were others, however, who looked at the political situation in Portugal and were prepared to treat the boarding party as insurrectionists taking political and military action against the Government of Portugal, even though the immediate object of that action was private property. But it would not be the first time that private property had been seized and private interests infringed in the course of insurrection, whether recognized or not.

This view has been expressly rejected by Professor Fenwick. His Note on "Piracy" in the Caribbean³ has an air of nineteenth-century romanticism about it. In the days of classical European liberal democracy, political life ran along ordered channels. Tyranny produced revolution and the preparations for the revolt were more or less generally known. The revolt itself would be a long time a-growing, and would finally erupt under the leadership of an organized opposition operating in the national territory or in a colonial possession. Nowadays, however, opposition in many countries is a clandestine matter, and when it erupts it tends to do so spontaneously, often with the organized element of the insurrection coming to the national territory as a body of 'liberating refugees' who have enjoyed asylum—and comfort, in the military sense—in a foreign State, led by a private individual who may never have held any sort of office before. Similarly, the body which is in insurrection frequently depends more on hope than on armed strength, hoping to receive popular support after it has secured a footing on the national territory. Perhaps the latest manifestation of this is to be found in Cuba, 1961.

Despite this, Professor Fenwick states:⁴

'Perhaps a case could be made out for Galvão as [insurgent] if, with a base of operations in the territory he was liberating, he had started his "National Independence Movement"

¹ *R. v. O.C. Depot Battalion R.A.S.C. Colchester, Ex parte Elliott*, [1949] 1 All E.R. 373.

² *Ker. v. Illinois* (1856) 119 U.S. 436.

³ *American Journal of International Law*, 55 (1961), p. 426.

⁴ *Ibid.*, pp. 427-8.

by secreting his followers on a Portuguese warship and beginning his "revolution" in the dead of night, with a flag of his own. But on this technical point Galvão failed completely. His so-called revolution only became known after he had seized a private ship; and at that point violence was used against civilians who were not part of the armed forces of his enemy, and some of whom were nationals of third states.'

In fact, there is no evidence to suggest that non-Portuguese nationals were subjected to any violence at all, and one United States passenger has reported that the raiders were careful not to molest the property rights of even the ship's Portuguese owners.¹ Had non-Portuguese interests been injured in any way, then, on Fenwick's reasoning, since the 'insurrection' failed, no remedy would lie in the Governments affected, a point that has been accepted by the United States Department of State.² Had Galvão's efforts succeeded in placing Delgado in power, Portugal would have been liable for injury caused to aliens by successful insurrectionists.³ Fenwick continued: 'The futility of the military effort might seem sufficient in itself to condemn the act.' Here he is overlooking the attitude of the State Department after the San Ignacio raid of December 1892⁴ and the dispute concerning Gazo's raid in 1886.⁵ In both, the raiders were treated as political offenders participating in a revolutionary attempt, even though the marauding parties concerned were insignificant in size. Professor Fenwick also inquires: 'How could the offence be called "political" when Galvão held no public office before starting his insurgent movement?' Nor did the marauders at San Ignacio, and it would be interesting to know what public office was held before 1775 by the Boston Tea-Party-goers, Paul Revere, the Sons of Liberty or Ethan Allen.

The problem of aid from abroad to governmental authorities engaged in combating an insurrection has occasioned much thought to international lawyers, and was particularly pressing at the time of the Spanish Civil War. The non-intervention experiment led Lauterpacht to write that:

'inasmuch as Italy and Germany undertook not to supply the rebellious forces with munitions of war, these arrangements constituted an undertaking on the part of certain Powers to refrain from committing an international illegality in consideration of the promise of other Powers to refrain from acting in a manner in which they were entitled—and, according to some, legally bound—to act.'⁶

It would have been easy for the Governments of Portugal's friends to justify their willingness to assist in the re-taking of the *Santa Maria* on the simple basis of a duty to assist a friendly and recognized Government. In the case of the United Kingdom, the argument could have been strengthened by reference to the ancient alliance. Where other States are concerned, since they and Portugal are Members of the United Nations, which is itself an alliance—this is the ground on which suggestions for a special East-West alliance have been rebuffed—the same argument would apply. This would have been in accordance with well-established principles of law, first consciously expressed over 200 years ago by Vattel:⁷ 'As for the allies of a State which is torn apart by civil war, they will find the rule for their conduct in the nature of their alliances considered in the light of existing circumstances.' It is one thing to justify one's intervention on

¹ Logan-Smith, *Life International* (27 February 1961), p. 35 (this passenger reports that they paid for everything they consumed at the bar).

² Hyde, *International Law* (1947), vol. 2, p. 981.

³ Ralston, *Law and Procedure of International Tribunals* (rev. ed., 1926), p. 343.

⁴ Moore, *Digest of International Law*, vol. 4, pp. 336-51.

⁵ Moore, *Extradition* (1891), vol. 1, pp. 324-5.

⁶ Oppenheim, *International Law*, vol. 1, s. 134, n. 3.

⁷ *Le Droit des gens* (1758), Book 3, ch. 18, s. 296 (Carnegie tr. ed., p. 340).

these grounds: it is entirely different to attempt to do so on the ground of piracy. Piracy, whatever the popular connotation of the term, possesses a definite legal meaning.

According to the Report of the Subcommittee of the League of Nations Committee of Experts for the Progressive Codification of International Law, in customary international law

'piracy consists in sailing the seas for private ends without authorisation from the Government of any State with the object of committing depredations upon property, or acts of violence against persons. The pirate attacks merchant ships of any nation without making any distinction except in so far as it will enable him to escape punishment for his misdeeds. He is a sea-robber, pillaging by force of arms, stealing or destroying the property of others and committing outrages of all kinds upon individuals. . . . [Pirates] become the enemies of the human race and place themselves outside the law of peaceful people'.¹

It is relevant here to recall the Note of Dana to the 1866 edition of Wheaton: piracy cannot 'embrace all acts of plunder and violence, in degree sufficient to constitute piracy, simply because done on the high seas. As every crime may be committed at sea, piracy might thus be extended to the whole criminal code'.² It is simple enough to apply this definition to marauders acting on their own account. Complications arise, however, when the marauders maintain that far from being private buccaneers, they constitute a political group motivated by anti-governmental intentions.³ There has long been controversy as to whether such groups may be treated as pirates *jure gentium* or not. If they are, their captors are entitled to try them regardless of their nationality or the nationality of their victims, although in normal circumstances they would not be within the criminal jurisdiction of the captor State. The right possessed by a third State to seize pirates only arises if the captives are *hostes humani generis* in the light of international law. The fact that they may be pirates according to the municipal law of their captors does not justify their capture on the high seas and their resultant treatment as pirates. If, however, the State of which the captives are nationals acquiesces in their capture, it is difficult to see what breach of international law has in fact been committed.⁴ On the other hand, the fact that the legislation of the national State describes the marauders as pirates imposes no obligation upon any other State to treat them in this way if the statutory piracy goes beyond the concept of piracy *jure gentium*.⁵

In 1821, at the time of the Greek rebellion against the Turks, Christopher Robinson, then King's Advocate (Law Officer) and later an Admiralty Judge, advised Lord Liverpool that 'it would not be proper to consider Persons as *Pirates* who may be cruising under a state of alleged Hostilities, whether regular or irregular, provided their intentions were in fact satisfactorily distinguished from the mere predatory character of Piracy, as considered in Law'.⁶ In a comment on this opinion, Lord McNair points out that 'this Report antedates the conception of recognition of belligerency, and appears to be based more on the absence of piratical intent than upon any conception of neutrality towards a civil war'.⁷

¹ Doc. C.196M.70.V, p. 116 (Hackworth, *Digest*, vol. 2, p. 681).

² *Elements of International Law*, p. 193, n. 83.

³ See, for example, Johnson, 'Piracy in Modern International Law', *Transactions of the Grotius Society*, 43 (1957), p. 63 at pp. 76 et seq.

⁴ *Molvan v. A. G., Palestine: The Asya*, [1948] A.C. 351.

⁵ See, for example, comments of Sir Wm. Scott in *The Le Louis* (1817), 2 Dods. 210, 239; and *The Resolution* (1781), 2 Dall. 1, 4. It should be pointed out that in February 1962, Portugal announced that Captain Galvão had been sentenced *in absentia* for seizing the liner, and would be tried under a new piracy decree; *The Times*, 22 February 1962.

⁶ Smith, *Great Britain and the Law of Nations* (1932), vol. 1, p. 284.

⁷ McNair, *International Law Opinions*, vol. 1, p. 267, n. 1.

With Robinson's opinion in mind, it is interesting to note the cases of *The Creole* (1841)¹ and the *Magellan Pirates* (1853).² The former case presents many characteristics which may be compared with the seizure of the *Santa Maria*. A large number of slaves on board an American merchant ship mutinied, murdered a passenger and took the ship into the British port of Nassau. Here, the mutineers were tried for piracy and acquitted, while the remaining slaves on board were liberated. These actions of the Bahaman authorities were approved by the Law Officers,³ who advised Lord Stanley that

'the Act of the Negroes in compelling by violence the Crew of the *Creole* to alter her course and take her into a British Port does not either by the General Law of Nations or by the Municipal Law of this Country amount to the Crime of Piracy, and therefore that it is not cognizable by any English Tribunal. We think there can be little doubt that any Tribunal before which the parties should be brought to trial would come to the conclusion that the intent and object of the Slaves was not that of General Plunder upon the High Seas, or of changing the Property of the Ship, and of converting it to their own use, but that the Acts of which they were guilty were committed with the sole object of compelling the Crew to take them in the Vessel to some Port where they might obtain their Freedom, and we think that the Act of the Slaves committed with such intent and object does not amount to piracy. They may be chargeable with the Crime of Murder, . . . but as there is not at present any subsisting Treaty [for the mutual surrender of Criminals] with the United States of America, we think that Her Majesty's Government is not bound on the Demand of the Government of the United States to deliver up the persons in question or any of them to that Government to be tried within the United States.'⁴

It is true that the United States did not accept this view of the Law Officers, and was sustained in this contention by the umpire who settled the dispute. However, at no time was it suggested by Secretary of State Webster or Umpire Bates that piracy had been committed. In their view, there had been unwarranted British intervention in the property interests of American merchants on American ships.⁵

The problem in the *Magellan Pirates* is far closer to that of the seizure of the *Santa Maria*, for here Lushington was concerned with whether insurgents operating at sea were in fact pirates. Chilean insurgents had seized an English and an American vessel lying in a Chilean port. After murdering the owner of one and the master of the other, the party put to sea. An English warship captured the English ship in the Strait of Magellan and the United States vessel in a Chilean port. The insurrectionists were handed over to the Chilean authorities—from whom, it may be presumed, they received short justice. When the warship returned to England a claim was lodged for bounty under the Piracy Act, 1850,⁶ in respect of all the persons captured. This claim succeeded. Lushington held that the words 'shall . . . attach or be engaged with any person alleged to be pirates, afloat or ashore' in s. 1 of the Act were wide enough to cover such acts as the seizures in the case, though committed in port and not on the high seas. 'We all

¹ McNair, *International Law Opinions*, vol. 2, pp. 79 and 85; Moore, *Digest*, vol. 2, pp. 352 and 358. ² 1 Spinks 81.

³ Dodson, later Judge of the Prerogative Court of Canterbury and Dean of Arches; Follett, later Attorney-General; and Pollock, later Chief Baron of the Exchequer. Their report is printed in McNair, *op. cit.*, vol. 2, p. 85 at pp. 86–87.

⁴ There was at the time of the incident and of the report no Extradition Treaty between the United Kingdom and the United States. After the signature of the Ashburton Treaty, 1842, the same three officers reported that 'a person actually a slave by the law of his own country would be considered by existing British law as capable of committing a crime' and extraditable; McNair, *ibid.*, p. 88, n. 4.

⁵ Moore, *op. cit.*, vol. 2, pp. 354–61; *International Arbitrations*, vol. 4, p. 4375.

⁶ 13 & 14 Vict. c. 26.

know that pirates are not perpetually at sea, but under the necessity of going on shore at various places; and, of course, they must be followed and taken there, or not at all.'

This extension of the concept of piracy to the activities of the offenders on land is not of direct relevance to the problems raised by the seizure of the *Santa Maria*. More important, in so far as the present investigation is concerned, are Lushington's comments on the interrelationship of acts of piracy with insurrectionary activities.

✓ 'It is true, that where the subjects of one country may rebel against the ruling power, and commit divers acts of violence with regard to that ruling power, that other nations may not think fit to consider them as acts of piracy. But however that may be, I do not think it necessary to follow up that disquisition on the present occasion. I think it does not follow that, because persons who are rebels or insurgents may commit against the ruling power of their own country acts of violence, they may not be, as well as insurgents and rebels, pirates also; pirates for other acts committed towards other powers. It does not follow that rebels or insurgents may not commit piratical acts against the subjects of other States, especially if such acts were in no degree connected with the insurrection or rebellion.'

It is clear from this that by the middle of the nineteenth century it was the view in England that insurgents, if they were to be treated as pirates, would have to commit some predatory act against the nationals of third States or their property, which acts would need *prima facie* to be unconnected with the political activities of the rebel group. This was the view adopted by official circles in the United States. Commenting upon the decision in *The Ambrose Light*,² Wharton, then Solicitor to the State Department, cites Lushington's Judgment and says of it that Sir Robert Phillimore 'shows that the ruling . . . was based, not on the position that the offenders in question were insurgents who had not been recognised as belligerents, but on the proof that their depredations were directed against others than their titular sovereign'.³ The fact that Phillimore in his *Commentaries upon International Law*⁴ only reproduces the relevant portions of Lushington's decision in no way detracts from Wharton's interpretation of it.

✓ In *The Ambrose Light*, which Wharton was criticizing adversely, Justice Brown of the New York District Court held that unrecognized insurgents, even though there was no proof of any intention of hostilities or depredations other than those incidental to the struggle of the rebels against the Government of Colombia, were in fact pirates. Apart from the strong subsequent dissent of Wharton, the decision was also inconsistent with comments addressed by Secretary of State Bayard to the Colombian authorities only shortly before the capture of the *Ambrose Light*:

✓ 'The Government of the United States cannot regard as piratical vessels manned by parties in arms against the Government of the United States of Colombia, when such vessels are passing to and from ports held by such insurgents, or even when attacking ports in the possession of the National Government. In the late civil war, the United States, at an early period of the struggle, surrendered the position that those manning the Confederate cruisers were pirates under international law.'⁵

A similar attitude, expressly rejecting a national declaration of piracy or outlawry, was adopted by the United States in connexion with the Venezuelan decree of 1885, the

¹ McNair, *op. cit.*, at p. 86.

² (1885) 25 Fed. 408.

³ *Albany Law Journal* (13 February 1886), p. 125 (reprinted in his *International Law Digest*, vol. 3, p. 469, and Moore, *Digest*, vol. 2, p. 1100).

⁴ (1879), vol. 1, pp. 498-502.

⁵ 9 April 1885, Wharton, *Digest*, vol. 3, p. 467. See, however, *The Times*, 3 May 1861, and *New York Herald*, 4 June 1861, reported *ibid*.

Haitian decree of 1889 and the Chilean revolt of 1891.¹ In the case of the latter in fact, the Secretary of the Navy informed Rear-Admiral Brown that the provision in the 1876 United States Navy Regulations that the officers and crew of any vessel acting as a warship or privateer without a proper commission should

'be considered as pirates and treated accordingly . . . does not refer to vessels acting in the interests of insurgents and directing their hostilities solely against the state whose authority they have disputed. It is only when such vessels commit piratical acts that they are to be treated as pirates, and unless their acts are of such a character or are directed against the persons or property of Americans you are not authorized to interfere with them.'²

This tends to imply that if the acts, though piratical in character, were directed against non-United States nationals the United States Navy would not be authorized to seize them, although if they were pirates in the ordinary sense it would be so authorized.

The United States rejection of *The Ambrose Light* finding that unrecognized maritime insurgents are pirates is perhaps best illustrated by Scott's note to the report of the Judgment in his *Cases on International Law*:

'Notwithstanding the opinion in the principal case, it is today recognised in practice as well as in theory, that a vessel belonging to insurgents who have not yet been recognised, will not be treated as a pirate engaged in a piratical enterprise, if it limits its actions to the parent state. . . . It is unnecessary to cite authority for this statement. . . .'³

This more liberal attitude to the problem was so well-established by the time of the League of Nations Codification Conference that the Sub-committee felt able to point out that, although States combating rebellions are entitled to describe the rebels as pirates and treat them as such, 'foreign Powers are not obliged to accept this description or to agree to such persons being treated as pirates'.⁴ A similar view was adopted by the Harvard Law School Research in International Law. In his commentary upon the draft Convention on Piracy, the reporter, Professor Bingham, points out that

'the draft convention excludes from its definition of piracy all cases of wrongful attacks on persons or property for political ends, whether they are made on behalf of states, or of recognised belligerent organisations, or of unrecognised revolutionary bands. Under present conditions there seems no good reason why jurisdiction over this type of case should not be confined to the injured state, the state or recognised government on whose behalf the forces were acting, and the states of nationality and domicile of the offender.'⁵

That these views were in line with the practice of States is brought out by the seizure of the S.S. *Falke* in 1929,⁶ the facts of which in many ways are almost on all fours with those of the *Santa Maria*, the prime difference being the nationality of the vessel. The German ship *Falke* was proceeding from Hamburg to Danzig. She put in at Gdynia where she took on arms and ammunition. She was also boarded by twenty-two passengers who, it later transpired, were Venezuelan revolutionists. Under threats, in which apparently the master participated, the crew continued the voyage, and the revolutionists made an abortive attack on the Venezuelan port of Cumaná. The Venezuelan Government condemned the raiders as pirates and called on all maritime powers to treat the vessel in accordance with international law. This led the United States to announce that

¹ Moore, *Digest*, vol. 2, pp. 1105-12.

² *Ibid.*, p. 1108.

³ (1922), p. 548, n. 7.

⁴ *Loc. cit.*, p. 499, n. 1, above, p. 119 (Hackworth, *Digest*, vol. 2, p. 695).

⁵ *American Journal of International Law*, 26 (1932), Supp., p. 786.

⁶ Hackworth, *Digest*, vol. 2, pp. 696-9.

'the question whether a vessel in the hands of insurgents is piratical depends upon its actions, that is, whether it confines itself to depredations against its own country, or commits depredations against vessels of other countries. Notwithstanding the decision . . . in *The Ambrose Light*, the weight of opinion is clearly to the effect that an insurgent vessel cannot be treated as piratical merely because the insurgents have not been recognised as belligerents.'

A similar view was adopted by the Government of Trinidad, to which the vessel went after the raid. 'The Acting Colonial Secretary emphasized the fact that at no time was the *Falke* ever considered a pirate. He stated that "this vessel might have been engaged in a filibustering expedition against Venezuela, but that is a very different affair from piracy".' Finally, in 1930, a Hamburg Court acquitted the owners and master on a charge of 'shanghaiing', no accusation of piracy having been lodged against them. In this case, in view of the fact that it was a foreign merchant ship that was seized, there might have been some basis for treating the Venezuelans as pirates and the *Falke* as a pirate ship, and this could have been done easily while the ship was at Port of Spain.

From the above there appears to be little doubt that those who seized the *Santa Maria* were Portuguese political dissidents whose act, especially since it was in no way directed against any non-Portuguese interest, cannot, according to customary international law, be regarded as piracy.

It is now necessary to see whether the Geneva Convention on the High Seas, 1958,¹ which is described in its Preamble as 'generally declaratory of established principles of international law', alters the position in any way.

According to Article 15, piracy is 'any illegal act of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship . . . and directed: (a) On the high seas, against another ship . . . or against persons or property on board such ship. . . .'² The party led by Captain Galvão had boarded the *Santa Maria* as passengers at two of her ports of call. The attack they launched against the ship came from on board the vessel itself. It would not, therefore, satisfy the requirement that the illegal act must be directed 'against another ship'. Further, the treatment of the ship once she had been seized, together with the statements made by Captain Galvão and General Delgado, made it perfectly clear that this seizure was not made 'for private ends'. From this it would seem that the seizure of the *Santa Maria* was as little piracy under what it is hoped will be international maritime conventional law, as it was under customary law. It is also relevant to mention the view of the International Law Commission which was responsible for the draft upon which the Convention was based: 'Acts committed on board a ship by the crew or passengers and directed against the ship itself, or against persons or property on the ship, cannot be regarded as acts of piracy. . . . Even where the purpose of the mutineers is to seize the ship, their acts do not constitute acts of piracy.'³

As was pointed out in the case of *The Creole*, the fact that mutineers are not pirates does not excuse them from all criminal liability. In fact, most extradition treaties list mutiny as one of the extraditable offences, while murder on the high seas receives the same treatment. In the absence of an extradition treaty there is no obligation upon a State to extradite any fugitive,⁴ although it may, of course, expel him as an undesirable alien. The *Santa Maria* was taken by her captors to Brazil, which had signed an extradition treaty with Portugal in August 1960. This treaty, however, had not been ratified

¹ Cmd. 584 (1958), Annex II; *American Journal of International Law*, 52 (1958), p. 842.

² Italics added.

³ *Yearbook of the International Law Commission for 1956*, vol. 2, p. 282.

⁴ See report of Dodson, Follett and Pollock on *The Creole*, text to n. 3, p. 500, above.

and was therefore ineffective in so far as Captain Galvão and his party were concerned. Further, most extradition treaties expressly provide that those fugitives who are accused of political offences will not be extradited. This principle has been expressly enacted into Brazilian municipal law. In *Re De Bernonville*, 1955,¹ the Supreme Court of Brazil held that by Law No. I. 802, 1953, extradition shall not operate against the authors of political crimes provided there is no allegation against the offender of other offences 'which notwithstanding their alleged political reason or purpose, are mainly a violation of ordinary law'. Among the other charges brought against De Bernonville by France was participation in murder.

The seizure of the *Santa Maria* involved the killing of a ship's officer. In order to determine whether the seizure, in spite of this killing, was political or not, it is necessary to examine the nature of political offences.

At the present time a distinction should be drawn, normally speaking, between the offence and the offender. The concept of political offences which appears to have gained current acceptance is that of Denman J. in *Castioni's case*:²

'To exclude extradition for such an act as murder . . . it must at least be shown that the act is done in furtherance of, done with the intention of assistance, as a sort of overt act in the course of acting in a political matter, a political rising, or a dispute between two parties in the State as to which is to have the government in its hands. . . . The question really is, whether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as part of the political movement and rising in which he is taking part.'

This definition clearly reflects the era of general liberal democracy, based on rival organized political parties, in which it was enunciated. That this was in fact the case is illustrated by Cave J.'s refusal to regard an anarchist as a political offender.³

In the modern world not only is anarchism as a political creed dead, but there are many countries, of which Portugal is one, where there is no organized political movement capable of indulging in acts directed against the Government. It is therefore becoming increasingly common for a fugitive offender to act on his own or together with a small group of other 'non-party' individuals, or to commit his offence while outside the national territory and directed against the national property or interests. For this reason it may now well be opportune to abandon the view that non-extradition is tied to the character of the offence, and to substitute instead a test related not to the act committed, but to the individual committing it. If such a change achieved nothing else, it would result in shifting the burden of proof from the fugitive, seeking to prove that his offence was political, to the demanding State which would have to prove that he was not a political offender but a common criminal.

In *Ex parte Kolczynski*,⁴ Lord Goddard C.J. did adopt such a functional approach. A party of Polish sailors had mutinied, assaulted a ship's officer, imprisoned the captain and sought asylum in the United Kingdom. There was no suggestion that these seamen were part of an organized political movement seeking to overthrow the established Polish Government. There was evidence to suggest, however, that when the ship returned to Poland they would be tried for statements of a political character made by them during the voyage. The

'resultant prosecution would thus have been a political prosecution. The revolt of the crew was to prevent themselves being prosecuted for a political offence and . . . therefore the offence had a political character. . . . The evidence about the law prevalent in the

¹ *International Law Reports*, 1955, p. 527.

² *In re Meunier*, [1894] 2 Q.B. 415.

³ [1891] 1 Q.B. 149, 157, 159.

⁴ [1955] 1 Q.B. 540, 550, 551.

Republic of Poland today shows that it is necessary, if only for reasons of humanity, to give a wider and more generous meaning to the words ["of a political character" used in *Castioni's* case], which we can do without in any way encouraging the idea that ordinary crimes which have no political significance will be thereby excused.'

In this case, the offence was mutiny aimed at preventing the possibility of a charge for a political offence. Further, the fugitives had acted as individuals protecting their own liberty, and not as members of an organized political movement seeking to take over the reins of government. In view of the facts of the case, it may well be considered that Captain Galvão's seizure of the *Santa Maria* was more political than was the action of the seven Polish seamen.

It is not only an English court which has adopted this more liberal approach to the problem of political offences and offenders. In February 1959 the German Federal Constitutional Court was faced with a plea¹ by a Yugoslav citizen that the charges brought against him by the Yugoslav Government were false. He therefore claimed asylum as a political refugee in accordance with Article 16 of the Federal Constitution.² Having drawn attention to the fact that 'the concept of political persecution . . . is characterised by deep-seated socio-political and ideological contrasts between States which have developed basically different internal structures', the Court went on to point out that

'there are a number of States in which . . . the power of the State is exercised in a manner contradictory to the principles of a liberal democracy. Hence the concept of political persecution must not be limited to so-called political offenders . . . but must be extended to persons prosecuted for non-political offences "where such persons, if extradited, would be liable in their home country to suffer measures of persecution involving danger to life and limb or restrictions of personal liberty for political reasons".'

In view of the position in Portugal and the attitude adopted by the Portuguese Government to General Delgado and his adherents, there seems little doubt that if Captain Galvão and his party returned to Portugal they would, regardless of the terminology of any indictment that might be presented against them, in fact 'suffer measures of persecution involving danger to life and limb or restrictions of personal liberty for political reasons'.

In the light of these cases, and despite the contentions put forward by Professor Fenwick, there seems little doubt that the seizure of the *Santa Maria* and the acts of violence connected therewith were political actions carried out by rebels. It is therefore submitted that the editorial in *The Times*, 'Pirates—or What?', is based on a false premiss when it says that 'if it should be held that not piracy but some other crimes have occurred in the *Santa Maria* difficult questions may arise if Captain Galvão asks for asylum in any State'.³ Likewise, it is not surprising that Fenwick's hope that 'we shall get a *cause célèbre* out of it all'⁴ has not borne fruit.

¹ Summarized, without a name, *American Journal of International Law*, 54 (1960), p. 416. For a fuller analysis of these cases and of the concept of political offence, see Green, 'Political Offences, War Crimes and Extradition', *International and Comparative Law Quarterly*, 11 (1962), p. 329.

² Paragraph 2: ' . . . The politically persecuted shall enjoy the right of asylum.'

³ 25 January 1961.

⁴ "Piracy" in the Caribbean', *American Journal of International Law*, 55 (1961), p. 462, at p. 428.

DOCTRINAL ASPECTS OF THE UNIVERSALITY OF THE LAW OF NATIONS*

By PROFESSOR C. H. ALEXANDROWICZ

I

THE process of European consolidation which has been gathering momentum since the end of the Second World War and now tends to assume various organizational forms can be traced back to the second half of the eighteenth century when some of the classic writers on the law of nations first conceived or pronounced the existence of a legally 'organized' European community of States (*Rechtsgemeinschaft*). Then, as well as now, this process was or is confined to the west European and partly central European region, leaving beyond its scope the countries of eastern Europe and the Balkans, though the boundary line between States which participated in it and those which were outside such participation was far from precise or stable. The gradual disintegration of the Habsburg Empire and the expansion to the west of the Russian Empire (irrespective of its form of government) left the boundary line for a long time in a state of uncertainty. Whatever the fluctuating division of areas on both sides, the early positivist writers of the eighteenth century pointed to the existence of a European tradition and continuity of intercourse which in their view justified the conception of a positive European law of nations based on treaties and custom. This regional conception was contrasted with that of the universal and natural conception of the law of nations which found itself in juxtaposition with new trends, and the ensuing conflict between them revealed a number of problems the significance of which is not yet sufficiently appreciated. The question was whether the positivist European reality was reconcilable with the idea of universalism of the law of nations which drew its legal source from the declining concept of natural law but had a reality of its own. To this question various answers were offered and it is characteristic that some of the leading classical writers showed comparatively less understanding for its solution in the long run than some of the lesser-known writers. It may be that the voice of the more 'fashionable' lawyers and authors who were at the same time counsellors or advisers to some of the European sovereigns at that period made itself more readily heard than that of the writers who, being more detached, showed perhaps more foresight as to the consequences of the prevailing ideological conflict. An attempt will be made to recall their views and to compare them with those expressed in the well-known treatises of the late eighteenth- and early nineteenth-century positivists.

II

The earliest systematic survey of writers and treatises on the law of nations was made by D. H. L. von Ompteda whose *Literatur des gesammten sowohl natürlichen als positiven Völkerrechts* appeared in Regensburg in 1785. One of Ompteda's personal titles on the front page of his work was that of 'Königlicher Gross-Britanischer Comitial-Gesandte bey der Reichsversammlung zu Regensburg'. Whatever the precise meaning of this honorary function it pointed (similarly as in Justi's or in Martens's case) to Ompteda's connexions with the sovereign of Great Britain and Hanover. Most of the eighteenth-century writers discussed by Ompteda were aware of the problem of the continuity of the universal family of nations in the peculiar circumstances created by positivist trends,

* © Professor C. H. Alexandrowicz, 1962.

and this applies to the Moser–Martens school of thought and its adherents as well as to its opponents. At the time of the appearance of Ompteda's work, J. J. Moser had already published his main treatises, while G. F. de Martens was still in the process of completing his works. Among the lesser-known authors listed by Ompteda the names of a few monographic writers deserve mention such as Justi and Surland, the first writing on questions of balance of power and cameralism, the second a relatively forgotten name but worthy of being recalled for his monographs on the law of the sea and on East India affairs.¹ However, the most significant suggestions on a combined naturalist-positivist approach to the law of nations and on the solution of some of its outstanding problems were made by Ompteda himself in the Introduction to the *Literature of the Law of Nations*.

In order to justify his proposed plan for a reconsidered treatment of the law of nations Ompteda offers the following functional classification of *jus gentium*: the bare natural law of nations (*jus gentium naturale*) covers all nations, civilized or not, and thus operates in the widest circle of communities in the most general way. Among the fundamental principles of the law of nature Ompteda gives prominence to the natural freedom, independence and equality of nations. As the development of inter-State relations brought about an expansion or contraction of the law of nature in its practical application, the requirements of intercourse between civilized nations called for a modified natural law of nations (*jus gentium voluntarium*) based on their *consensus praesumptus*.² Ompteda quotes as examples of rules of the modified natural law of nations the prohibition of use of poisoned weapons or the systematic application of privileges and immunities to diplomatic envoys. These and other rules tended to appear simultaneously or at different periods in various parts of the world under different circumstances governing inter-State relations.³ The above *consensus praesumptus* is revealed irrespective of agreement or express submission to legal rules. Further modifications of the natural law of nations take place by tacit consent generating customary law (*jus consuetudinarium*) or by the conclusion of treaties which create *jus gentium pactitium*. As stated above, this classification presupposes the existence (apart from *jus gentium naturale et necessarium*) of a *jus gentium voluntarium*, a term already used previously by many classic writers including Grotius. Ompteda then concerns himself with the problem of reconciliation of the *jus gentium voluntarium* which tends to be regional law within a particular group of nations bound by intercourse and the universality of the law of nations and offers the following weighty observation:

'In view of the fact that the civilised nations are mainly to be found in Europe, at least until now, the teachers of the law of nations called the last two categories of the law of nations (i.e. the modified and customary law of nations) the European law of nations. However, as there exist outside Europe since a long time, civilised nations . . . to which the law of nations of these two categories applies . . . the term European law of nations is much too limited.'

Ompteda's concern with the above limitation was highly justified for the ascendancy of the positivist conception at the cost of natural law threatened to affect the universal

¹ Among the works of other writers Ompteda also quotes Bouchaut's *Théorie des traités de commerce* (1777); various essays by von Steck; and Zschackwitz's *Gründliche Nachricht vom Handlungswesen . . . sämtlicher Völker der Welt* (1736). Among earlier writers Ompteda refers to Groening's *Bibliotheca juris gentium exotica seu de juris naturae et gentium principiis iuxta doctrinam asiaticorum, etc.* (1701) (a work concerned with the civilization and legal institutions of extra-European countries); and to Leibnitz's *Codex juris gentium diplomaticus* (1693).

² Ompteda refers in this respect to Wolff's *Civitas Gentium Maxima* and to Vattel's *Droit des gens*.

³ See, for instance, the classic Hindu literature on the prohibition of unlawful weapons and on the immunity of envoys (Dutas); Armour, 'Customs of Warfare in Ancient India', *Transactions of the Grotius Society*, 8 (1923).

character of the law of nations. Positive law based entirely on custom and treaty tended to be limited to the European sphere of interests (*Particularrecht*) and could not provide a basis for extra-European intercourse with the possible exception of the U.S.A. which received the European law of nations practically *in toto*.

The question before Ompteda was how to secure the idea of continuity of the universal family of nations which had acquired a reality of its own. It is clear from a survey of works relating to overseas trade with particular reference to the well-established European-Asian commercial relations, and from the comment which Ompteda offers to these works, that he tried to assimilate the so-called modified law of nations to the positive law of nations and thus reconcile universalism with positivism. Insisting on the need for a joint treatment of the law of nations from a positivist as well as naturalist point of view,¹ he criticizes the teachers of the European law of nations in an unambiguous way, saying: 'they ignore the primary and true universal rules of the law of nations'. Ompteda's reasoning implies the fear that many civilized nations outside Europe would, according to positivist views, find themselves in a legal vacuum being neither in the orbit of European positive law (*Particularrecht*) nor even covered by the rules of the declining universal natural law which tended to be displaced by the former. As we shall see later, most of the extreme positivists had no satisfactory solution to offer to this dilemma, thus leaving the extra-European State entities which had enjoyed a legal status in the family of nations in the past to the position of candidates for admission to the European circle of States which assumed the role of recognizing or not recognizing external entities.² To understand the significance of this situation reference should be made to some of the writers quoted by Ompteda, in the first instance to Moser.

III

J. J. Moser's principal works are on *The First Basic Notions of the Present European Law of Nations* (1778) and on *The Most Recent European Law of Nations* (1779). As the titles indicate, he is predominantly concerned with the positive *Particularrecht* in the European area. But characteristically enough he is unable to escape the problem of universality of the law of nations which he has to face in the discussion of problems of overseas trade. In his first work he refers, *inter alia*, to the commercial competition between European States in Asia (or Africa) and states as follows: 'Where European nations have only settlements or comptoirs in Asia (or in African States), they cannot exclude there other nations from trade and commerce; this may happen only on the basis of treaties between European nations *inter se* (e.g. the exclusion of the Austrian Netherlands from East India trade) or on the basis of treaties concluded with Asian and African States'. In his second work Moser returns to the suppression of the Austrian East India Company in Ostende and recalls the renewed efforts of the Government in Vienna to organize East India trade from Trieste. He also refers to the memorandum of the King of Prussia presented in 1752 to the United Provinces of the Netherlands in which the King defends the rights of the Prussian East India Company in Emden. To this memorandum the United Provinces replied that the subjects of the King of Prussia have no doubt a natural right to trade with other nations whose harbours are open to all nations of the earth (*tous les peuples de l'univers*) with the exception of those in which the Dutch East India Company received the privilege of exclusive trade.

¹ In this respect Ompteda refers to the plan of a work by Carl Gottlieb Günther.

² See 'The Theory of Recognition in Fieri', by the present writer, this *Year Book*, 34 (1958). Under the natural law of nations recognition of States and Governments, if necessary at all, was declaratory while positivism supported the constitutive theory.

Great Britain issued a declaration in similar terms pointing to the natural freedom of trade with the exception of trade reserved to the English East India Company. Moser then refers to the peculiar circumstances of trade relations maintained with Asian sovereigns and admits that the European law of nations is not applicable to them and thus they must be governed by the natural and universal law of nations which does not allow European powers to occupy the lands of extra-European nations under the pretext of religion or otherwise. It follows from the above that Moser's exclusive positivist European ideology had to give way to some extent to extra-European considerations of a practical nature. Moser, like all other eighteenth-century positivists, does not ban the natural law of nations from the international scene though he admits it only against his principal train of thought and subject to reservations. The concept of universalism was, nevertheless, capable of holding a qualified position of its own in spite of adverse doctrinal developments.

Among the writers quoted by Ompteda, Joannes Julius Surland deserves particular mention. His monograph *Juris Germanorum Navigandi Indias Prima Fundamenta* appeared in Marburg in 1751.¹ Surland refers to East India trade established by the British, Dutch, French, Danes and Swedes² who all shared its riches with Portugal and Spain, and complains: 'Solis germanis harum terrarum litora denegata fuerunt.' The following were the three obstacles to German navigation to the East: 'Eorumque navigationi tria potissimum obstare dicuntur: 1) dominium maris, 2) inventio adque occupatio, 3) leges et pacta.' As to possible difficulties connected with restrictions on the freedom of navigation Surland states rightly: 'Omnem de mari libero . . . cessare litem statuo'. He refers here to Selden's writings and to Grotius's pioneering work on the freedom of the seas and to the ultimate victory of the concept of *mare liberum* over that of *mare clausum*. As to the invocation of the right of discovery and occupation of overseas lands by European nations Surland mentions the claims of the Spanish-Portuguese school of thought based, *inter alia*, on the Papal title (*Bull 'Inter Caetera'*) and, dismissing the lawfulness of these claims, refers to the right of Asian powers to equality within the family of nations: 'Cum pari in parem non concedatur imperium.' Surland quotes, *inter alia*, the eighteenth-century decrees of the emperors of China regulating trade with foreign nations. Finally, Surland recalls the foundation of the East India companies by several European powers and the treaty relations established through these companies with Indian sovereigns and quotes Barbeyrac saying: 'Les autres états . . . ont la liberté d'aller et de négocier dans les pays des Indes libres et indépendens qui veulent la leur permettre . . .'. Thus he concludes: 'Cum igitur nullae Germanis obstant leges, ipsis Batavis confitentibus, jus in Indias navigandi habemus.'³ Surland's argumentation is, of course, primarily directed towards justifying the establishment of German trade in the East Indies, particularly in view of the abolition of the Ostende Company in 1731; but it is significant that he relies on the natural law of nations which provides a universal framework for intercourse between any European nation (even one which had not yet acquired vested interests in the East India trade) and Asian Powers which he considers as sovereign and equal participants in this inter-

¹ Surland (1724-58) was Professor at the University of Frankfurt a. d. O. He was the son of J. J. Surland, a German jurist (1657-1748).

² Unlike the British, Dutch and French East India companies which extended their activities from trade to politics on a grand scale, the Danish and Swedish East India companies were purely trading agencies. The first was established in 1612 (with a new establishment in Altona founded in 1728). The Swedish Company was established in 1731; Rousset, *Recueil historique d'actes* (1731).

³ And further: 'Nec tamen animum demittat ac de Indiarum commercii plane desperet moesta Germania . . .'.

course. Surland refers also in his work on maritime law¹ to the need for reliance on the natural law of nations in all cases in which affairs relating to East India trade are not covered by treaties. He draws attention to the view according to which treaties regulating generally trade and navigation cannot be presumed to extend to such trade and navigation in the East Indies which either calls for the inclusion of specific provisions in treaties or must be judged by the principles of natural law as the law held in reserve.

Another writer to whom Ompteda makes reference is J. H. G. von Justi, but Ompteda misses among his works the most important as far as the universality of the law of nations is concerned, i.e. his book on Asian government.² In this work, as well as in his *Chimäre des Gleichgewichts der Handlung*, &c. (1759), Justi discusses the difference between what he calls *Aktivhandel* and *Passivhandel*, the first expressing the fact that a country carries its external trade to foreign markets, and the second the policy of a country limiting its foreign trade activities to its own internal markets. While the European powers engaged in *Aktivhandel vis-à-vis* Asian countries, the latter contented themselves with pursuing a *Passivhandel*. However, Justi criticizes heavily the activities of the various East India companies engaged in *Aktivhandel* in Asia, and considers their policy of power economics and of supporting their trade with armed forces as unlawful in the law of nations.³ With Grotius⁴ he considers the Asian countries as sovereign and their cultural tradition and political institutions as equal if not superior to Europe's 'aggressive' civilization. In distinction to other writers who displayed a European egocentric attitude, Justi had a fuller appreciation of the significance of European-Asian commercial intercourse within the framework of the universal family of nations which called for the application of the same legal principles to all its participants.⁵

IV

Ompteda's work is limited to treatises and works on the law of nations published before 1785, and it is for this reason that he does not list or discuss the writings of Martens. Both Moser and Martens occupied apart from their academic activities political advisory posts, Moser as Councillor of the Wurtemberg Estates, and Martens as Aulic Counsellor (*Hofrat*) of the Hanover Government which brought him into contact with the English legal world. No doubt both had a considerable grasp of practical questions confronting the European powers in the second half of the eighteenth century, but as to the formulation of legal problems Martens excels Moser by a more systematic classification and exposition of these problems. Among Martens's works the most prominent are his *Essay on the Positive European Law of Nations* (1787), the *Précis du droit des gens modernes de l'Europe* (1789), translated into English by

¹ *Grundsätze des europäischen See-Rechts* (1750).

² *Des gouvernements de l'Europe comparés à ceux de l'Asie et aux autres prétendus barbares* (1762).

³ Reference may also be made to Abbé G. T. F. Reynal who expressed similar views in his *Histoire philosophique et politique des établissements et du commerce des Européens dans les deux Indes* (1770).

⁴ See *The Freedom of the Sea* (transl. by van Deman Magoffin, ed. by Scott, 1916).

⁵ Justi also recommends the establishment of a universal monarchy in Europe and states thoughtfully that this would lead to the termination of competing European trade monopolies in the Asian countries and allow prices of Asian export goods to find their natural level; see *Gesammelte politische und Finanzschriften* (1761). In this work Christian Wolff's influence on Justi makes itself felt, though Wolff had advocated a universal *civitas maxima* while Justi finds it not acceptable; see *Die Chimäre des Gleichgewichts der Handlung und Schiffahrt* (1759), p. 70. But Justi similarly to Wolff is an exponent of Chinese institutions of government which he considers in many respects worthy of consideration.

William Cobbett (1795), the *Recueil des traités* (1791), and his *Cours diplomatique ou tableau des relations extérieures des puissances de l'Europe* (1801). Martens's dilemma of reconciling the particular European positive law of nations with the universal natural law of nations has been discussed by Hubrich in his paper on 'Georg Friedrich von Martens und die moderne Völkerrechtsgemeinschaft',¹ but the author confines himself mainly to the examination of Martens's essay on the existence of a positive European law of nations and to his *Précis du droit des gens*, ignoring the significance of his approach to the problem in the *Recueil des traités* and the *Cours diplomatique*. An attempt will be made to recall Martens's views against the wider background of the latter works and to draw attention not only to opinions expressly stated by him in the *Précis* but also to those implied in his other writings and revealing some of the more deep-seated controversies which arose out of the clash between regional European positivism and the universal ambit of the law of nations.

The idea of supplying courts of European sovereigns, universities and scientific institutions with collections of treaties had been taken up long before Martens by a number of writers. In this respect Ompteda draws our attention particularly to the works of Dumont, Lünig and Rousset. Among these collections Dumont's *Corps universel* (1731) had been of outstanding value, and it is characteristic that the author had not confined himself to giving the texts of European treaties only but quoted a number of treaties concluded between European and Asian powers particularly those entered into by the Dutch East India Company with Indonesian and Malayan rulers and by the United Provinces of the Netherlands with Persia.² Lünig's name deserves to be recalled in connexion with his *Theatrum Ceremoniale* (1719), in which he refers, *inter alia*, to the diplomatic ceremonial observed in a number of Asian courts such as in Persia, Siam, Turkey and China. The description of diplomatic usages was combined with an account of negotiations which led to the conclusion of treaties such as the French-Siamese treaties in the seventeenth century, the texts of which are given separately by Dumont. Reference to Asian treaties is also to be found in Rousset's *Recueil historique d'actes* (1731), and in Kluit's *Hist. Foederum* as well as in his *Index Chronologicus Sistens Foedera Pacis, Defensionis, Navigationis, Commerciorum, &c.* (1789). All these and other collections were instrumental in assisting Martens in the preparation of his *Recueil des traités* in which he included a good deal of extra-European treaty material. In this respect it would be relevant to recall what Martens writes in the prefaces to the various volumes of the *Recueil*.

After the publication of the first three volumes Martens had been criticized in the *Nouvelle bibliothèque universelle d'Allemagne* (vol. 104, pp. 34-52) for the omission of various treaties from the above volumes. Martens admits in the preface to Volume IV that he had not included in these volumes the treaties between England and East Indian countries which had been published in England in 1790. Reference is here made to: *The Collection of Treaties between Great Britain and Other Powers*, by G. Chalmers which (it may be noted) had been but one of the English collections, earlier collections being *Treaties and Grants from the Country Powers to the East India Company* (1774), or William Bolt's *Consideration of India Affairs* (Treaties, 1772). In the preface to Volume VI Martens states that he included subsequently a number of English-East India treaties in order to correct the omission, and he emphasizes that if he had to start

¹ *Zeitschrift für Politik* (1914), pp. 362-89. See also Habenicht, *Georg Friedrich von Martens* (1934).

² See the Dutch-Persian Treaty of 1631 which is of particular significance in that it provides for privileges and immunities for a Persian settlement in Amsterdam in the nature of capitulations; see *Indian Year Book of International Affairs* (1960).

the collection again he would have provided for a separate volume comprising East India treaties for the benefit of those readers who are interested in them. Finally, in the preface to Volume VII he refers to the search for treaties between Great Britain and the sovereign of Bengal which he was able to find and to include in the *Recueil*. It seems quite clear from these statements that though the general purpose of his collection of treaties was to support the exposition of a positive European law of nations, Martens did not ignore the significance of treaty-making in the wider field of extra-European relations and the legal rules observed in universal inter-State intercourse.

His attitude is the same in the *Cours diplomatique* also called *Tableau des relations extérieures*. Martens examines here, *inter alia*, the treaty and diplomatic relations between European and Asian powers adopting the method of their discussion country by country, i.e. between France and India and Siam; between Great Britain and the various independent rulers of the Indian sub-continent; between the Netherlands and the Indonesian and Malayan rulers as well as Ceylon and Persia; and between Russia and China. Reference is also made to the activities of the Danish, Swedish and Prussian companies in the East, and separate observations are offered in relation to the Ottoman Empire. The picture which emerges from the *Cours diplomatique* is far from being exclusively European. Full cognisance is taken of the development of world trade and of legal transactions which accompanied its expansion within the universal framework of the law of nations.

If the above two works of Martens constitute an integral and significant part of his literary legacy in the field of the law of nations, it is impossible to leave them out of account in considering the views he expresses in the *Précis du droit des gens*, much as these views follow the general trend of limiting the law of nations to the sphere of a positive legal European system. The weakness of giving expression to this trend side by side with the awareness of the requirements of an expanding world trade is obvious in the various chapters of the *Précis*. Thus, while Martens emphasizes the existence of that legal system as serving the purposes of a European *Rechtsgemeinschaft* bound together by common ties of intercourse, tradition and civilization, he tends to be inconsistent with his own views when he proceeds to the examination of the external trade of European powers in the East Indies. The inconsistency is the more significant as he supports his views on the theory of the positive law of nations by extensive treaty material quoted in the annex to the *Précis* of which Asian treaties form a far from insignificant part. It would, of course, be possible to argue that the treaties concluded by European countries with a number of Asian powers are simply part and parcel of the positive treaty-making activity of the former in which the latter played an insignificant role only, but again such an interpretation could hardly accord with reality, as the European-Asian treaties (much as they tended to follow the European pattern of draftsmanship) are only too often the expression of a compromise reached between both parties as to the application of their legal conceptions in mutual transactions. The International Court of Justice has recently confirmed the correctness of this proposition when it examined the Maratha-Portuguese Treaty of 1779 in the dispute between Portugal and India over the alleged Portuguese right of passage to the enclaves of Dadra and Nagar Aveli.¹ An attempt was made in the proceedings to contest the validity of the Treaty if judged by our general notions of treaty law. The Court emphasized in its Judgment that an eighteenth-century treaty must be interpreted on the basis of legal notions peculiar to both parties and in force at the time of its conclusion. It considered the Treaty perfectly valid by eighteenth-century standards and stated that both parties

¹ *I.C.J. Reports*, 12 April 1960.

to it recognized themselves, bound by its provisions, though the form of the Treaty complied with local usage of including the agreement between the parties in two separate documents written in the language of each of the parties. Moreover, the Court, in interpreting the legal nature of the cession of the enclaves by the Maratha Empire to the Portuguese, took into consideration the peculiar character of the grant made by the Marathas, i.e. that of a Jagir, and analysing its juridical content on the basis of Maratha or Mogul notions of vassalship or feudal tenure, came to the conclusion that no sovereignty was transferred which could justify a Portuguese right of passage through Maratha territory. Judge Moreno Quintana, in a significant pronouncement, stated that the transaction between the parties created 'mutual rights and obligations between two legal persons recognised as such in their international relationship', a statement which leaves us in no doubt about the views of the learned judge (and a number of other judges) on the status of an independent Asian country in the eighteenth-century law of nations. Thus it would not be impossible to view the numerous Asian treaties quoted by Martens in three of his main works in the light of the above observations and to consider them as an expression of ties of intercourse between European and Asian sovereign powers. They do in fact reflect a network of commercial and political relations which could not remain in a legal vacuum. The juridical status of the parties was conditioned by the universality of the natural law of nations which allowed Asian powers to be normal participants in treaty and diplomatic relations within the orbit of the law.¹ On the other hand, the introduction of some of their legal concepts in treaty provisions made them direct contributors to the development of an initial positive law of civilized nations not limited to European intercourse only. A more detailed survey of these treaties would reveal the influence which Asian powers exercised on their contents, such as, for instance, in respect of vassalship, certain institutions of maritime law, the jurisdiction exercised over merchants in foreign territory containing elements of capitulations, the exchange of prisoners of war, and so on.²

However, it is undeniable that while Martens in the handling of the treaty material seems to be implicitly open to the wider conception of the law of nations, he remains in the theoretical exposition of the law, in his *Précis du droit des gens*, a staunch adherent to the positivist doctrine. Particularly, he denies the existence of a universal positive law of nations and points to the differences in habits between European and extra-European nations, stating that even Turkey, in spite of her European possessions and relations, differs from the European approach to the law of nations in many respects. He concedes, therefore, the universal character of the law of nations within the framework of natural law only, and rejects Ompteda's proposition to assimilate the modified natural law of nations to positive law. Thus we read in the *Précis*: 'If from the fact that all

¹ As to the validity of treaties between Christian and non-Christian powers, Ompteda refers to a number of monographs dealing with the subject, such as, for instance: Cacheranus, *Disputatio an Principi Christiano Fas sit pro sui suorumque bonorum tutela foedus inire ac amicitia infidelibus iungi* (Taurini, 1569); or Pott, *De Foederibus Fidelium cum Infidelibus* (Jena, 1686). While commercial treaties between Christian and non-Christian powers were considered perfectly valid by these authors, political treaties were classified by them to the effect that alliances with Muslim powers were invalid or questionable, while treaties with Hindu (or Buddhist) powers were regarded as not objectionable. See also Ward, *Enquiry into the Foundation and History of the Law of Nations* (1795), vol. 2, pp. 325-6.

² Treaty-making between European and Asian Powers contributed to a considerable extent to the secularization of the Law of Nations. See 'Treaty and Diplomatic Relations between European and South-Asian Powers in the seventeenth and eighteenth Centuries', by Alexandrowicz, *Recueil des cours* (1961).

states and people inhabit the same globe . . . and that it will be possible one day to establish between them a positive society, one could draw certain principles distinguishable from those of the law of nations, *jus cosmopoliticum*, those principles must be considered as being of philosophical origin only and not drawn from positive law.' Martens refers here to Kant's doctrine of the *Jus Cosmopoliticum* and to the significance of modern communication (navigation) which makes it possible in Kant's words 'to exploit the right to the earth's surface common to all mankind in the interest of commerce'.¹ Distant continents may come into peaceful relations which are finally publicly legalized, bringing mankind at last nearer to what Kant calls a cosmopolitan (federal) constitution. Emphasizing the rapidly spreading commerce of the peoples of the earth, Kant stresses that, 'the conception of cosmopolitan law is not a fantastic, extravagant idea of morality (only); on the contrary it is a necessary supplement . . . to the law of nations as well as to the universal rights of mankind in general'.

Martens is well aware of the legal requirements of world commercial intercourse; he speaks in the *Précis* about 'Indian kings (who) concluded treaties with certain European powers' and about the freedom of the latter to trade with the peoples of India and of other parts of the globe if the latter *agree* to such trade.² But though he admits 'that there are nations outside Europe which cannot be denied the character of civilised nations', he is reluctant to call the law applicable to such relations the law of civilized nations which in his view is undefined if compared with the European law. These statements dismissing the possibility of an extension of the idea of universality from natural to positive law are not quite reconcilable with Martens's wide treatment of extra-European commercial relations, and they lead to the absurd conclusion that while the universality of the law of nations could be legally upheld on the basis of the natural law concept, it was not admissible on the basis of the positive law of nations which tended to assume a monopolistic position with Europe as its centre. The legal principles of universal relations, much as they had a reality of their own, were therefore gradually shifted to a second, more and more insignificant, plane; and this leads to the conclusion that the re-universalization of the law of nations could only have taken place by positivist ways and means, i.e. by the admission of extra-European State entities to the European positive society. However, this view, as proposed by the later positivists (if judged by objective standards), must be considered as offending the idea of the continuity of the family of civilized nations from which the extra-European entities (which had enjoyed an international legal status prior to the nineteenth century) could not be presumed to have disappeared. In this sense Hubrich, in his discussion of Martens's dilemma, speaks about the meaningless admission of Turkey to the European concert (family of nations) in 1856.³ Its meaninglessness is the more striking if the development of the family of nations (as for instance conceived by Oppenheim)⁴ is presented as the gradual enlargement of the circle of Christian States in Europe (including the U.S.A.) to the Christian States outside Europe, e.g. Haiti and Liberia, and much later to non-Christian powers such as Turkey, Persia, Siam, China or Japan. The question may arise whether it is really feasible to consider Haiti and Liberia as older members of the family of nations than the Ottoman Empire, Persia, Siam or China which, as testified by Martens and other classic writers, entertained treaty and

¹ Kant's *Perpetual Peace* (transl. by O'Brien), *Grotius Society Publications*, 7 (1927).

² See *Précis* (2nd ed., 1801), p. 235: 'Chaque nation de l'Europe est en droit d'établir un commerce avec tous les peuples des Indes ou d'autres parties du globe qui sont disposés à y donner les mains . . .' (italics are mine).

³ See *op. cit.*

⁴ See *International Law* (8th ed.), vol. 1, pp. 48-49. See also Nussbaum, *A Concise History of the Law of Nations* (1954), p. 190.

diplomatic relations with various European powers since the sixteenth or seventeenth century.¹ Whether the Moser–Martens school of thought is directly responsible for the more or less general acceptance of these views may be doubted, but it had its impact on a number of writers indirectly, particularly through the early nineteenth-century positivists such as Schmalz, Klüber, Wheaton and others who gave to its ideas a more permanent, though legally distorted, shape.²

V

Before concluding this brief examination the question may be asked whether it would be possible for the historian of the law of nations to suggest a reconsideration of the meaning of the above doctrinal developments in the light of a new tentative analysis of theory and practice of the law of nations in Europe as well as Asia in the past. If it is a feasible proposition at all it must proceed on the lines of assessment of the realities which confronted the family of nations at a period of ideological changes. The eighteenth-century world was at the same time one of expanding world commercial relations and one of contracting international legal conceptions. The conflict between the two tendencies did not allow a proper place to be found for the natural law principle of world intercourse within the positive law of nations which was shrunk to the European area. But whatever the possible way out of this dilemma, a solution which condemned extra-European participants in world intercourse to a legal vacuum could hardly be considered realistic. To say for the convenience of upholding doctrinal trends which tended to be one-sided at the cost of consistency that State entities which had enjoyed legal status within the natural family of nations in the past are in a doubtful legal position if judged by positivist standards is to judge the past by *ex post facto* law and to offend the dogma of continuity of the family of civilized nations. Thus the so-called admission or re-admission of extra-European States as found in the treatises of nineteenth-century writers can only mean an inter-temporal re-adjustment of their position caused by doctrinal developments. The family of nations could not have been reduced from universality to a regional framework by a change of doctrine. Admission of new States was and is possible only in relation to entities which came newly into being. It cannot comprise those of them which existed long before and drew their legal status from a law of civilized nations in mutual intercourse whose universality had been an undisputable reality.³

It is in the light of these observations that the views of writers such as Ompteda who advocated the assimilation of the modified natural law of nations to the new positive law and the adoption of a law of civilized nations seemed more in consonance with the reality of events than those of some of the well-known positivist writers who allowed themselves to be carried away by the compelling force of doctrinal trends.⁴

¹ As to the status of Turkey in international law see McKinnon Wood, *American Journal of International Law* (1943), pp. 262 et seq.; and Smith, *Great Britain and the Law of Nations*, vol. 1, p. 17.

² Hubrich, *op. cit.* See particularly Schmalz, *Völkerrecht* (1817); Klüber, *Droit des gens modernes de l'Europe* (1819); and Wheaton, *Elements of International Law* (1st ed., 1836 and 3rd ed., 1848).

³ As to the fallacy of considering capitulations as an impediment to the acceptance of this view, it would be relevant to state that the origin and development of capitulations calls for a thorough reconsideration; Alexandrowicz, *loc. cit.*, p. 250.

⁴ There might also have been other reasons for which the elimination of the natural law concept was not wholly advisable even from the European point of view, to mention the partitions of Poland which by positivist standards were justifiable but were a flagrant violation of the principles of the natural law of nations (see Introduction to Martens's *Précis du droit des gens* (ed. by Vergé, 1864), p. xvi).

CLAIMS BY INTERNATIONAL ORGANIZATIONS IN RESPECT OF INJURIES TO THEIR AGENTS*

By M. J. L. HARDY

FOLLOWING the submission in 1948 of a memorandum¹ by the Secretary-General dealing with a number of cases of death or injury suffered by United Nations personnel, mainly in Palestine, as a result of acts possibly involving State responsibility, the General Assembly requested an advisory opinion from the International Court of Justice in order to determine whether or not the Organization could bring an appropriate international claim. The actual questions put to the Court were as follows:

- I. In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations, as an Organization, the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him?
- II. In the event of an affirmative reply on point I (b), how is action by the United Nations to be reconciled with such rights as may be possessed by the State of which the victim is a national?²

In the Advisory Opinion given on 11 April 1949,³ the International Court held unanimously that, whether or not the State concerned was a Member State, the United Nations could bring an international claim in respect of the damage it had itself incurred. The Court also held, by 11 votes to 4, that the United Nations might claim in respect of damage caused to its agents or to their dependants. Lastly, the Court held, by 10 votes to 5, that a conflict between a claim brought by the United Nations and a potential claim by the victim's national State would normally be avoided by virtue of the fact that, in bringing a claim in respect of injury to its agent, the Organization was actually seeking reparation for a breach of an obligation due to itself; if a reconciliation of such claims was necessary, however, it would depend on considerations applicable to the particular case and on agreements reached between the Organization and the national State concerned.⁴

The importance of the *Reparations* case in recognizing the degree of international capacity to be accorded to the United Nations is well established, and it is not proposed to deal except indirectly with that aspect of the Opinion here. It is, however, suggested that certain problems which may arise in the consideration or pursuit of an actual claim by an organ of the United Nations were either minimized at the time of the Opinion, or were hidden by the abstract nature of the questions asked and the assumptions upon which the Court's answers were based. The object of the present Note is to outline some of those problems briefly, together with certain tentative solutions, and to show how the principle of the functional protection of the Organization may operate in

* © M. J. L. Hardy, 1962.

¹ General Assembly, Doc. A/674, 7 October 1948. *General Assembly, Official Records* (hereafter referred to as *G.A.O.R.*), 3rd session, Annex, p. 219.

² General Assembly Resolution No. 258 (III), 3 December 1948.

³ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, *I.C.J. Reports*, 1949, p. 174. In the text the Opinion is referred to as either the *Reparations* or as the *Injuries* case.

⁴ *Ibid.*, pp. 187-8.

practice. The absence of a bulk of well-documented case law on the topic should not be allowed to suggest that the issues raised are exaggerated or unlikely to present themselves. The staff of the international bodies forming part of the United Nations system may be divided into three broad groups: those of different nationalities and in expatriate status, usually gathered at the principal offices of the organ, the best examples being, of course, officials stationed in New York and Geneva; large numbers of local staff, usually having the nationality of the host State and employed particularly by the operational agencies; and, lastly, technical assistants and other personnel who are engaged in field missions in underdeveloped parts of the world. The circumstances in which members of these three classes may be injured as a result of acts for which States may be held responsible suggests that in each instance a wide range of different factual and legal considerations will need to be considered by the legal advisers of the Organization. When it is recalled that the presence of the United Nations is in itself usually an indication that the area in question is disturbed and that the hostility of sections of the population may be provoked against it, it is clear that the practical implementation of the principles underlying the *Reparations* Opinion is one of some importance as well as of difficulty.

(a) *The scope of functional protection*

Traditionally, the duty of protection owed to officials of a foreign State has been higher than that owed to aliens as such; whereas in the latter case the claimant State is normally treated as having received damage only through injury to its national, in the former case its own interests are immediately involved. Whether for that reason, or because foreign diplomats are officially accredited to the recipient State, that country is required to show a more scrupulous care for their safety than for ordinary aliens who may be living and carrying on business there.¹ Attacks upon foreign public officials and upon premises occupied by them have indeed been made specific penal offences in some municipal systems.² The question therefore arises as to the position to be adopted *vis-à-vis* international personnel—are they to be treated on a par with other aliens residing in the host country, or are they to be given the higher degree of protection shown to officials of another State? This issue was amongst those which arose in the well-known *Tellini* case in which the Italian General of that name was assassinated in Greece whilst serving with a border commission appointed by the Conference of Ambassadors.³ The Committee of Jurists appointed to consider the legal aspects of the case by the Council of the League of Nations reported, *inter alia*, that:

‘The recognized public character of a foreigner and the circumstances in which he is present in the territory entail upon the State a corresponding duty of special vigilance on his behalf.’⁴

This extraordinary status and the obligations flowing from it, including the rendering of the reparations sought by the Conference of Ambassadors, were subsequently acknowledged by Greece.

In the case of the United Nations no express reference is made to such a duty in any of the principal instruments governing relations between States and the Organization. Nevertheless, it was generally recognized in the *Injuries* case that such an obligation

¹ For references to authorities see, for example, those cited in the *Reparations* Opinion by Mr. Feller, Counsel for the United Nations; *I.C.J. Pleadings*, 1949, p. 77.

² See, for example, Perrenoud, *Régime des privilèges et immunités des missions diplomatiques étrangères et des organisations internationales en Suisse*, pp. 108 et seq.

³ See the commentary and account given by Eagleton, *American Journal of International Law*, 19 (1925), p. 304.

⁴ *League of Nations Journal* (1924), p. 524.

was owed. In their arguments before the Court various parties, in particular France,¹ stressed the practical need for such protection and the analogies which could be drawn with previous situations in which it had been provided. The majority of the Court reached the same conclusion largely by relying on the principle of effectiveness;² in their view the obligations flowing from the broad words of the Charter³ necessitated that the Organization should have capacity both to protect its agents and to bring claims on their behalf if that protection were not provided and injury resulted. The actual questions put to the Court, however, only referred to claims in respect of injuries received 'in the performance of (the agent's) duties', and Dr. Kerno, arguing on behalf of the United Nations, was at pains to state that what was being sought was not a general right of claims-espousal on behalf of officials, like that possessed by a State *vis-à-vis* its nationals, but only a limited right in respect of injuries incurred during service.⁴ When the ambit of the grounds upon which the Organization may itself seek protection under the Charter are contrasted with the apparently more restricted circumstances in which it may bring claims on behalf of its agents, a point of difficulty arises in determining the precise conditions under which claims under the latter head may in fact be brought. To illustrate the point at issue, supposing a threat was made to a United Nations staff member in the course of his private activities, could the United Nations request the host authorities to take special measures on his behalf on the grounds that unless such steps were taken the Organization would be hindered in the fulfilment of its mission? If the Organization did so request but the staff member was nevertheless injured through a failure to provide adequate protection, what difference would it make to a claim whether or not he was injured during the actual performance of his official duties?

The difficulties involved in answering these questions may best be considered by reference to a number of variants upon an agreed situation. It is clear that where an official is killed or injured whilst performing official duties and for that very reason—the paradigm case envisaged in the *Reparations* Opinion—the Organization may recover both for its own losses and for those of the victim or his dependants. The first variant is, therefore, the case in which the staff member is injured whilst actually carrying out official duties, but the fact that he is an official is in itself extraneous. If, for example, a staff member's landlord grew so angry with him that he burst into the office and shot him, could the Organization recover on his behalf? The answer to this situation, it is

¹ *I.C.J. Pleadings*, 1949, esp. at pp. 14 and 103–5. See also Fitzmaurice in this *Year Book*, 27 (1950), pp. 22–23.

² See Lauterpacht, *The Development of International Law by the International Court*, pp. 180–1 and 274–6.

³ Particular reference was made to the terms of paragraph 5 of Article 2 requiring Member States to give the United Nations '... every assistance in any action it takes in accordance with the present Charter' and to Articles 104 and 105. The text of Article 104 is as follows:

'The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.'

Article 105 provides:

'1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.

'2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization.

'3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.'

⁴ *I.C.J. Pleadings*, 1949, p. 65.

suggested, would normally depend on the degree of protection to be given to the United Nations premises where the event took place and the exact allocation of pertinent responsibilities between the Organization and the host authorities.

The second variant, the converse of the first, involves the infliction of an injury on the official, not whilst he is in the course of performing an official responsibility, but simply by reason of the fact that he is an agent of the Organization. The most obvious example is, of course, a claim in respect of an injury received by a staff member during a public riot directed against the United Nations. It may be supposed that this instance would normally be near enough to the clear case envisaged in the *Reparations* Opinion to enable the Organization to recover, since it would involve *ex facie* both a breach of the duty of protection owed to the Organization and of the duty of special protection to be given to public officials under general international law.¹ A more difficult situation might arise, however, if the Organization itself appeared to have some connexion with the situation which had arisen. Supposing, for example, a former staff member believed that his appointment had been terminated as a result of the prejudice of his colleagues and took revenge upon them at their homes; the Organization might regard the injury as service-incurred; the host State requested to forestall this offence might reply that the internal administration of the Organization had created the situation and must bear the consequences. Whilst there is some basis in international case law and in doctrine for suggesting that provocation by the victim, amounting to culpability, might affect the outcome of the claim and the amount of damages recoverable,² nevertheless it may be argued that the Organization could still claim, even in this set of circumstances, provided it could prove that the host State had shown less than due diligence in dealing with the matter. This might well be difficult in practice, however,³ unless evidence could be adduced demonstrating that the local authorities had received notice of the threat but that they had neglected to take the appropriate measures.

The third and last variant raises the problem under discussion in its sharpest form: what if the official is injured, neither whilst performing any duty, nor merely because he is an official, but solely as a result of a breach of an obligation owed to the Organization? For example, a bus-load of personnel might be injured on the road immediately outside some United Nations premises, say an acknowledged danger spot, owing to the failure of the host authorities to supply a policeman as requested. A more difficult problem involving the same point would occur if the need for protection arose in the private activities of staff members. In the case of the bad-tempered landlord, for example, if the staff member was injured at home, before he had mentioned the matter

¹ It may be noted that the United Nations was apparently prepared to take this position in one case which arose. A Mr. Wasson, American Consul-General in Jerusalem, was shot on his way home after attending a meeting of the United Nations Truce Commission of which he was a member. The reason given by the United Nations for not pursuing a claim was the limited evidence available; it was not suggested that the circumstances in which the shooting took place would in themselves have precluded a claim. *Annual Report of the Secretary-General, 1950-1, G.A.O.R., 6th session, Suppl. No. 1 (A/1844), p. 189.*

² See the *Third Report on International Responsibility* submitted to the International Law Commission by Garcia Amador, Special Rapporteur, Doc. A/CN.4/111, 2 January 1958, at pp. 22-24, 72-73, and references cited therein. It may be recalled that in correspondence regarding responsibility for the death of Count Bernadotte, the Government of Israel pointed out that the United Nations Mediator had refused the escort offered to him; see *G.A.O.R., 5th session, Doc. A/1347*. In the claims arising out of the deaths of the two observers who were shot after their plane landed at Gaza, the United Nations admitted that the Egyptian authorities had not received notice of the flight and that the plane had apparently flown over a forbidden zone. *Annual Report of the Secretary-General, 1952-3, G.A.O.R., 8th session, Suppl. No. 1 (A/2404),*

³ As the *Wasson* case shows; n. 1, above.

to the administration of the Organization, there can be little doubt that the only international remedy, if any, for the injury would lie in the hands of the official's national State. In the event, however, that the staff member had told the Organization beforehand of the threat, the Organization would have had to consider whether its own interest in reliable and efficient administration was sufficiently involved to necessitate a request for special protection. Possibly a number of key personnel might be involved. This question would need to be determined by reference to the constituent instruments of the particular body concerned and to those governing relations between it and its members, together with any accompanying practice.¹ If the Organization could, however, demonstrate that its own operations would be appreciably affected unless proper measures were taken to protect its staff, then it is submitted that a failure to take those measures would give rise to a claim both in respect of the Organization's own losses and of those of its agent.

The reasoning behind the answers suggested to these problems lies in the supposition that the juridical issue to be resolved in each is not: how was the injury received? but, what was the scope of the United Nations interest towards which a duty of protection was owed? Upon examination of its Opinion it will be found that, although the Court largely² repeated the words used by the General Assembly in phrasing the reply to be given to that body, nevertheless the actual argument of the Court was placed on a wider basis and expressed in more general terms than the questions themselves necessitated. Thus, having stated initially that question I presupposed that the damage had occurred '... from a failure by the State to perform obligations of which the purpose is to protect the agents of the Organization in the performance of their duties',³ and having referred to '... the undeniable right of the Organization to demand that its members shall fulfil the obligations entered into by them in the interest of the good working of the Organization',⁴ the Court finally said that: 'When the United Nations as an Organization is bringing a claim for reparation of damages caused to its agent, it can only do so by basing its claim upon a breach of obligations due to itself.'⁵ Although, therefore, the Opinion was only strictly concerned with claims in respect of injuries incurred during the performance of duty, it is suggested that it is in fact authority for the pursuit of claims on a less restricted basis, namely as a result of breaches of obligations due to the Organization itself, the objects of which are to safeguard the agent in the interests of the Organization.⁶ This, of course, is in accordance with the principle

¹ It is instructive to note in this connexion that in bringing a claim against the Government of Jordan in respect of the death of Ole Bakke, a United Nations guard, the United Nations based its claim on three distinct grounds: violation of the agreement for the demilitarization of the Mount Scopus area; violation of the obligations owed to the United Nations to facilitate the Mediator's mandate and to furnish adequate protection of his staff; and the failure to take necessary measures to bring the culprits to justice. The first violation arose out of a specific agreement; since Jordan was not a member of the United Nations at the time, both the other grounds were therefore based on obligations owed to the United Nations only under general international law. *Annual Report of the Secretary-General, 1950-1, G.A.O.R., 6th session, Suppl. No. 1 (A/1844), p. 189.* The third ground was also relied upon in the claim arising out of the deaths of the two United Nations observers at Gaza air strip. *Annual Report of the Secretary-General, 1952-3, G.A.O.R., 8th session, Suppl. No. 1 (A/2404), p. 145.*

² But not exclusively; see the terms of the Court's answer to question II, *I.C.J. Reports, 1949, p. 188.*

³ *Ibid.*, p. 177.

⁴ *Ibid.*, p. 184.

⁵ *Ibid.*, p. 188.

⁶ Upon the basis of the United Nations arguments in the *Bakke* case (n. 1, above), it may be argued that the obligations need not in fact be specifically designed to ensure the safety of United Nations as such and may even be independent of the day-to-day operations of the Organization.

laid down by the Permanent Court of International Justice that: 'By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law'¹ and the Court's reiteration that '... only the party to whom an international obligation is due can bring a claim in respect of its breach'.² It may be noted furthermore that Judge Badawi Pasha, the only one of the dissenting Judges who analysed the means by which the Court reached the conclusion that the Organization could sue on behalf of its agents, indicated in his Opinion that the legal grounds upon which a claim could be brought (as opposed to the reasons why the Organization should have international legal capacity) were the same, in the eyes of the Court, whether the Organization was bringing a claim merely on its own behalf or also on behalf of its agent.³ The conclusion is therefore reached that the requirement that the injury must have been incurred in the performance of duty means, in effect, that the Organization requires the staff in its service to be protected so that they are able to perform their functions on its behalf. There will, of course, be exceptions to this brought about by the staff member's own conduct. Pursuit of a claim in respect of the Organization's own losses and those of its agents rests in either case upon the same juridical foundation, namely breach of an obligation of protection owed to the Organization itself. The remaining points at issue involve demonstration by the Organization that the measures which should have been taken lay properly within the scope of the duty owed by the State concerned, and that that State in fact failed to take those measures or to take them adequately. The disadvantages of a contrary opinion are clear enough; if a narrow interpretation is placed upon the circumstances in which functional protection can be demanded and, in the event of failure, redress obtained, the Organization's security and independence would be greatly reduced. In a situation in which the responsibilities of the host State began and ended more or less with the established working hours, the injured official would be thrown back on the remedies available to him from his national State, thus reducing the need, on which the Court laid such stress, for the official to feel protected by the Organization itself.

A problem to test the scope of the circumstances in which the United Nations may actually request protection may arise out of the dual loyalties (and responsibilities) of an international agent towards the Organization and his national State. If riots broke out in the country in which the staff member was serving, directed against persons of his nationality, could the Organization claim special protection on his behalf, or would he be required to seek the assistance of his national Embassy? If the latter view is adopted, what degree of protection could be claimed by the staff member's Government—that higher degree owed to those with a recognized public status or merely that due to an ordinary alien?⁴ The *Reparations* Opinion made no direct reference to this situation, nor do analogies drawn with the rules applicable in instances of dual nationality provide any particular assistance. No positive answer can therefore be given to the problem except to point out that a complaint by the staff member's national State that the host authorities had failed to provide the protection due to an official of recognized public status (as opposed to that due to an alien) would hardly accord with the principle

¹ *Mavrommatis Palestine Concessions* case, *P.C.I.J.*, Series A, No. 2, p. 12.

² *I.C.J. Pleadings*, 1949, pp. 181–2.

³ *Ibid.*, pp. 205–16, esp. at p. 211. For a similar view see Fitzmaurice in this *Year Book*, 29 (1952), esp. pp. 16–18.

⁴ The French Government stated that only the duty due to an alien could be demanded by the official's national State; see the *Reparations* case, *I.C.J. Pleadings*, 1949, p. 15.

already quoted that '... only the party to whom an international obligation is due can bring a claim in respect of its breach'.¹ For that reason, and because the superior (or primary) loyalty and obedience owed by the official to the Organization has placed him in the country in question, national and international interests would seem to combine in this instance to support the claim being made by the Organization. This view would also accord with the better-established situation where the Organization seeks protection from the host Government against its own acts or those of its citizens on behalf of staff members holding local nationality.

Finally, the existence of a number of problems of remoteness of damage may be noted, although similar instances might possibly arise in cases between States. Assuming that United Nations premises were damaged in circumstances involving breach of a State's duty of care, could the United Nations recover in respect of a staff member who happened to be on leave that day but who received injury whilst going past in his car?² The injury would not be one incurred in the performance of official duties in the literal sense of the term, but would it in any case be a direct enough consequence to support a claim arising out of the breach of the obligation due to the Organization? Here again, no categorical answer can be given and the matter would have to be determined in the light of the particular circumstances and a study of precedents drawn from international and municipal case law.

(b) On whose behalf protection may be sought

As has been seen, the claim to receive protection must be based on the needs of the Organization itself and not on those of the individual.³ In so far, however, as protection is required for the particular agents through whom alone the Organization can operate, what definition is to be given to this class of persons? During the hearings in the *Reparations* case, Dr. Kerno informed the Court that the word 'agent' had been deliberately chosen in order to comprise the various types of individual who had already received injury.⁴ The definition he gave was of '... all persons acting on behalf of the United Nations or any of its organs'.⁵ The Court itself gave a yet more general interpretation, saying that it understood the word 'agent' '... in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the Organization with carrying out, or helping to carry out, one of its functions—in short, any person through whom it acts'.⁶

The most obvious comment on this definition is that it is wider than that of members of the Secretariat.⁷ The observers killed in Palestine, for example, were national officials, placed at the disposal of the United Nations, whilst the United Nations Mediator, Count Bernadotte, was in himself a subsidiary organ of the United Nations. The employees of various subsidiary bodies, such as the staff of the Office of the United Nations High Commissioner for Refugees and of the United Nations Relief and Works Agency for Palestine Refugees, are also included, although their appointments are

¹ n. 2, p. 521, above.

² Would it make any difference if he had actually gone back to the building to collect his letters?

³ It is clear that at international law, for international agents even more than for national ones, all 'rights' which the individual may enjoy are derived from his service and are given only because of the necessities of that service. See, in particular, the express statement in the General Convention on Privileges and Immunities, Article V, section 20: 'Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves.'

⁵ *Ibid.*, p. 64.

⁴ *I.C.J. Pleadings*, 1949, p. 65.

⁶ *Ibid.*, p. 177.

⁷ See, for example, *Repertory of Practice of United Nations Organs*, vol. 5, pp. 97 et seq..

made by the administrative head of the organ concerned to whom they are responsible and not by the Secretary-General. It may be noted that the latter Agency has reported making several claims in respect of injuries to its staff members and has drawn the attention of host Governments to the need for special protection.¹ Lastly, the definition of 'agent' is appreciably wider than that of officials on whom privileges and immunities are conferred under the General Convention on Privileges and Immunities. This instrument does not extend to those who are 'recruited locally and are assigned to hourly rates';² nevertheless, upon the basis of the Opinion in the *Reparations* case, the United Nations organ concerned could bring an international claim on their behalf, despite the lack of immunity these employees enjoy even in respect of official acts.

Whatever looseness and arbitrariness the definition of 'agent' may have, its basic rationale, namely the link with the functioning of the Organization, is clear enough. Moreover, it fits in suitably with the requirement of the nationality of claims rule stressed by the Court in the *Nottebohm* case,³ namely that before the plaintiff State can bring a claim in respect of its national the link of nationality must amount to a genuine connexion between them.

(c) *Attributability of the injury to service and international administrative law*

The question of who decides whether the injury received had any connexion at all with United Nations service and the position under international administrative law have not so far been considered. On the international plane, the first question must obviously be determined by the Organization itself, before deciding to pursue the claim, and then, in the event of a dispute arising with the defendant State, by any tribunal which the parties might decide to set up. The matter is mentioned here owing to the presence under international administrative law of parallel machinery which determines whether or not the injury was service-incurred and specifies the appropriate amount of compensation. Appendix D to the United Nations Staff Rules, for example, provides that staff members shall receive compensation in the event of death, injury or illness '... which is determined to be attributable to the performance of official duties of the United Nations';⁴ the necessary ruling being made by an internal Advisory Board.⁵ Equivalent provisions exist under the Staff Rules of other United Nations bodies.⁶ The close similarity between the terms of the questions put to the Court in the *Reparations* case and the tests laid down in the Staff Rules suggests that, in the event of a ruling by the Organization that an injury was not service-incurred, *prima facie* it would be difficult for the Organization to present a claim against a Government for the injured person's losses. It is submitted, however, that the ruling under international administrative law should not be regarded as conclusive of the matter. In the first place the rules are primarily designed to protect the staff member against the acts of the employer agency itself, and of fellow employees, rather than against the possible delinquencies of Governments. Secondly, the degree of protection which the Organization may seek for its own benefit from a host State, by reason of the international obligations of the latter, will be considerably wider and usually less specific than the duty of care which the Organization will owe to the particular employee. To return to

¹ *Annual Report of the Director of the United Nations Relief and Works Agency for Palestine Refugees*, 1955-6, G.A.O.R., 11th session, Suppl. No. 14 (A/3212), Annex G, paragraph 17; *ibid.*, 1957-8, G.A.O.R., 13th session, Suppl. No. 14 (A/3931), Annex H, paragraph 5.

² General Assembly Resolution No. 76 (I), 7 December 1946.

³ *I.C.J. Reports*, 1955, p. 4.

⁵ Section IV, Article 16.

⁶ E.g. Annex II to the *Staff Regulations of the International Labour Organization*.

⁴ Section II, Article 2 (a).

the examples given under (a) above, it is unlikely that all of the injuries involved would be attributable to service, unless at the least the area where they occurred had been designated as one 'involving special hazards to the staff member's health or security'.¹ Lastly it may be pointed out that not all United Nations agents receive compensation in identical circumstances; certain distinctions exist, for example between the entitlement to compensation of members of commissions and of ordinary staff members, though individuals in both classes might fall within the definition of United Nations agents. In short, proceedings between the United Nations and the defendant Government occur at a different level from those conducted by internal United Nations machinery, and by reference to different criteria.

(d) *Monetary reparation: types and measure of damages*

The first question which may be raised is why monetary reparation should be paid at all, even where State responsibility is clearly established. It can be said that any act or omission of such a character is one impinging equally on the whole community and as such should be allowed to lie where it falls.² Alternatively it may be argued that, whereas in a case between States the plaintiff is seeking to pursue one of its objects as a State, namely maintenance of national strength, the United Nations has no such limited political objective. Whatever the theoretical position may be, however, the United Nations has considered it necessary to seek financial reparation from individual States for the particular wrongs done to its agents, as well as asking for formal apologies and assurances for the future.

In the *Reparations* Opinion itself it was held that the Organization was entitled to request the defendant State to take due measures to prevent recurrence of the offence, as well as to render all proper signs of regret; nevertheless, the Court did not feel called upon to specify the precise heads of damages which the Organization might recover. The Court did, however, state that the Organization should obtain reasonable compensation for its direct losses, including, for example, the cost of providing a replacement for the deceased staff member³ as well as for those incurred by the victim himself or his dependants. Speaking before the Court on behalf of the United Nations, Dr. Kerno referred to the payments which had been made in respect of the deaths and injuries already incurred to cover such expenses as hospital and funeral costs as well as indemnities to dependants.⁴ These sums were in fact later sought from the various Governments concerned, and in some cases recovered. It may be presumed that in most cases the monetary compensation which the United Nations will seek, in addition to the items mentioned, will in fact be the sums payable on the death of the agent under his contractual and statutory conditions of service. Supposing, however, in the case of the official injured whilst on leave, the Organization decided that, although the injury could not be considered service-incurred, an *ex gratia* payment should be made; could the responsible Government be called upon to pay this as part of the Organization's direct losses? Once more it is hard to give a firm answer, although certainly the balance of proof would lie in favour of regarding a payment of this character as self-incurred by the plaintiff body.

Finally, it may be noted that the Secretary-General made an express disclaimer of

¹ Appendix D to the *United Nations Staff Rules*, Section II, Article 2 (b) (ii).

² See the discussion and authorities referred to in the *First Report on International Responsibility* submitted to the International Law Commission by García Amador, Special Rapporteur, Doc. No. A/CN.4/96, 20 January 1956, pp. 28-30.

³ *I.C.J., Pleadings*, 1949, p. 181.

⁴ *Ibid.*, at pp. 54-55.

any intention to claim exemplary damages.¹ This decision has been regretted² and the question may be asked why, on other than grounds of policy, the United Nations took this decision. It was suggested during the debates in the Sixth Committee that such damages could be claimed solely by the national State.³ If this view is maintained it will mean that, in the case of an injury involving inhuman cruelty and deliberately inflicted because the victim was a United Nations official the Organization would fail to seek the full reparation for the offence committed and to that extent appear to condone it. On the other hand, it may also be argued that all payments of monetary reparations have a punitive element, designed to reflect the mistrust and lack of safety felt by other foreigners after the wrongdoing.⁴

(e) *Who may bring the claim*

During the pleadings in the *Reparations* Opinion Dr. Kerno stated that the question of who could bring the claim on behalf of the United Nations was a question for its internal administration.⁵ In his memorandum following the delivery of the Opinion, the Secretary-General declared that, as chief administrative officer of the Organization, he considered that it was his responsibility to initiate and conduct any international claims on its behalf.⁶ This ruling was approved by the General Assembly in a subsequent Resolution⁷ and it may be presumed that all subsequent claims by the United Nations have in fact been brought, or at least authorized, by him. In the case of the Specialized Agencies it would appear that, in so far as they possess capacity to pursue an international claim, this would be done through their respective administrative heads. The position as regards the subsidiary bodies of the United Nations, such as the Office of the United Nations High Commissioner for Refugees and the United Nations Relief and Works Agency for Palestine Refugees, is more complicated since the staff concerned do not form part of the normal Secretariat and do not come under the authority of the Secretary-General. Nevertheless, the second of those two bodies at least has actually brought claims at international law in respect of injuries to its officials,⁸ and since its constituent instruments, namely a series of General Assembly resolutions, would seem insufficient in themselves to enable distinct international personality to be granted, it must be presumed that such claims have been based on that of the United Nations itself.

(f) *Procedures and mode of settlement; the local remedies rule*

One of the differences traditionally observed between claims by a State on behalf of its nationals, and those on behalf of its officials, is that whereas in the first, either as a procedural or as a substantive requirement, available local remedies must be exhausted, in the second no such rule applies; the plaintiff State can go straight to the Foreign Ministry of the offending State. The familiar question now comes as to what position is to be adopted in the case of international organizations in respect of injuries to their agents. On this question the attitudes adopted on different occasions have

¹ In his Report (Doc. A/955) to the 4th session of General Assembly.

² By Eagleton, *Recueil des cours* (1950—I), at pp. 379–80.

³ See *G.A.O.R.*, Sixth Committee, 4th session, at p. 281, paragraph 22.

⁴ Cf. Brierly in this *Year Book*, 9 (1928), p. 48.

⁵ *I.C.J. Pleadings*, 1949, p. 66.

⁶ See reference given in n. 1, above. This is an instance of reserve powers, unallocated to any specific body, being assumed by the Secretary-General.

⁷ General Assembly Resolution No. 365 (IV), 1 December 1950.

⁸ See n. 1, p. 523, above.

shown some variance. Mr. Feller, addressing the Court, stated that application of the rule might need to be considered, without giving any indication of the particular variety of cases he had in mind.¹ Eagleton in his Hague Lectures pointed out that there seemed no reason why the rule should not be observed,² although this would presumably require a waiver of immunity by the Organization if its own interests were involved in any action a staff member might wish to take. Reverting to the examples given above, it may be argued that the staff member threatened with a private nuisance should, as a first step, have recourse to local remedies. No waiver of immunity would be required to enable him to do so, since the local courts would have automatic jurisdiction over acts of a private character.³ The inconclusive position adopted by Mr. Feller may in fact be correct, having regard to the many different ways in which State responsibility may arise in respect of a staff member's injuries. However, in the Secretary-General's memorandum to the General Assembly, outlining the procedures which he proposed to take in the light of the Opinion given in the *Reparations* case, no mention was made of recourse to local remedies. The Resolution accepting the memorandum instead laid down that, having first established whether a claim should be brought, the Secretary-General should then consult with the victim's national State in order to discover whether it wished to join in the claim as co-plaintiff; these consultations would also enable the defendant State to receive assurances against the possibilities of two claims. When those consultations had been completed, the Secretary-General might proceed to negotiations with the defendant Government and, in the event of their failure, to arbitration. Finally, the Secretary-General was to report annually regarding the progress of claims brought.⁴ These procedures were in fact followed in the claims arising out of the deaths or injury of the United Nations Mediator, the various military observers and others in Palestine. Two claims, that in respect of Count Bernadotte and of Colonel Sérot who accompanied him, were successful. Three were dropped, one in respect of a former American Consul-General and the other two in respect of two observers, of French nationality, who accidentally set off a land mine. Three were halted at the refusal of the two Governments concerned either to accept responsibility or, in one instance, to agree to the setting up of a fact-finding body. The record therefore, as shown by these cases at least, is not altogether satisfactory from the standpoint of the United Nations; nevertheless, the over-all advance in the recognition of the capacity of the Organization to present a claim and the grounds upon which it may do so should not be forgotten, even if the more advanced position which has been reached to that of being on more equal terms with sovereign States still has its defects and uncertainties.

¹ *I.C.J. Pleadings*, 1949, p. 89.

² *Recueil des cours* (1950—I), at pp. 351-2.

³ Unless, of course, the official was one holding full diplomatic privileges and immunities under Article V, section 19, of the General Convention on Privileges and Immunities. Such rights are only enjoyed by officials of the rank of Assistant Secretary-General and above, on behalf of whom the Organization could most easily request special measures of protection.

⁴ The Secretary-General has used his *Annual Report* in order to give an account of the steps taken. The cases referred to in the text are largely dealt with in his *Reports* to the Fifth to Tenth Sessions of the General Assembly; Docs. A/1287; A/1844; A/2141; A/2404; A/2663 and A/2911. None of the national States of the victims raised any objection to claims being made by the United Nations, or themselves pursued claims.

THE 1960 ELECTIONS TO THE INTERNATIONAL COURT OF JUSTICE*

By J. L. SIMPSON

THE agenda of the XVth Session of the General Assembly of the United Nations included an item relating to the elections of members of the International Court of Justice, which covered the election of a member to fill the vacancy caused by the death of Sir Hersch Lauterpacht (the supplementary election), and the regular or triennial election to fill one-third of the fifteen seats on the Court.

The procedure for elections of both types is basically the same and may be briefly recalled. The Secretary-General of the United Nations calls upon the national groups in the Permanent Court of Arbitration, or, where States are not represented in the Permanent Court of Arbitration, national groups appointed by their Governments for this purpose, to nominate candidates. The resulting list of candidates is submitted to the General Assembly and to the Security Council, which proceed independently of one another—so Article 8 of the Statute of the Court has it—to elect members of the Court. The Members of the United Nations are supplemented on such occasions in the General Assembly by States which, though not Members of the United Nations, are parties to the Statute of the Court and bear a share of the Court's expenses. Candidates who obtain an absolute majority of votes in the General Assembly and in the Security Council are considered as elected.¹ The Rules of Procedure of the General Assembly² and the Provisional Rules of Procedure of the Security Council³ both now provide that a meeting of the body concerned shall continue until as many candidates as are required for all the seats to be filled have obtained, in one or more ballots, an absolute majority of votes. Though the meaning of 'meeting' was controversial in the early days,⁴ the United Nations has evolved a practice which overcomes the difficulties. By the simple device of suspending and resuming a sitting rather than closing it, a 'meeting' of the General Assembly or the Security Council can be continued over several days and indeed indefinitely. The 'first meeting' mentioned in Article 11 of the Statute of the Court has thus come to mean simply the period of time needed by the General Assembly or the Security Council, as the case may be, to produce a list of candidates who have secured the necessary majorities equal in number to the seats to be filled. Candidates whose names appear in both lists are elected. The second and third 'meetings', provided for in Article 11 of the Statute, are devoted to balloting for the remaining vacancies.

At the time of the 1960 elections there were 99 Members of the United Nations and three States—Liechtenstein, San Marino and Switzerland—entitled as parties to the Statute of the Court to participate in the elections. Included in the figure of 99 Members was Congo (Leopoldville). That State had been admitted to the United Nations, but the question of its representation led to prolonged proceedings in the Credentials

* © J. L. Simpson, 1962.

¹ Statute of the International Court of Justice, Articles 4, 5, 7, 8, 10, 11 and 14. For the participation of States not members of the United Nations, cf. General Assembly Resolution 264 (III) of 8 October 1948.

² Rule 152.

³ Rule 61.

⁴ Cf. Rosenne, *The International Court of Justice*, pp. 127–8; Rudzinski, 'Election Procedure in the United Nations', *American Journal of International Law*, 53 (January 1959), pp. 97–98.

Committee and in plenary meetings of the General Assembly and was not finally resolved until after the elections to the Court had taken place. It has been the consistent practice of the United Nations to interpret the words 'absolute majority of votes in the General Assembly' in Article 10 of the Statute of the Court as meaning a majority of all the qualified electors, whether they vote or not.¹ Although its delegation had not been seated, Congo (Leopoldville) was regarded as a qualified elector; the total of electors was taken as 102 throughout the elections and therefore the required majority in the General Assembly as 52. The majority required in the Security Council is 6, the vote being taken without any distinction between the permanent and non-permanent members.

The supplementary election

Sir Hersch Lauterpacht died on 8 May 1960. At its 864th meeting on 31 May 1960, convened to consider an application by the Republic of Togo for admission to the United Nations, the Security Council took up the question of the date of the election to fill the vacancy, a function entrusted to it by Article 14 of the Statute of the Court. The Security Council adopted without dissent a resolution deciding that the election should take place during the XVth Session of the General Assembly.² This was in accordance with the usual practice of the United Nations to postpone elections to fill casual vacancies on the Court till the next regular session of the General Assembly. There appears to be no constitutional reason why such an election should not be held during a special session,³ but no Government has ever requested a special session specifically for this purpose. The question hardly arose in the case under discussion. It is the Secretary-General's practice to delay issuing the invitations to national groups to nominate candidates for a casual vacancy until the Security Council has fixed the date of the election, whenever he can do this without exceeding the time-limit of one month imposed on him by Article 14 of the Statute of the Court. Since the Security Council did not meet till 31 May, and since in accordance with Articles 14 and 5 of the Statute of the Court there has to be an interval of at least three months between the Secretary-General's request to the national groups for nominations and the election, the election to fill the vacancy caused by the death of Sir Hersch Lauterpacht could not in any case have taken place much before the opening of the XVth Session of the General Assembly on 20 September 1960.

The candidates were Sir Gerald Fitzmaurice (United Kingdom), nominated by the United Kingdom and thirty-four other national groups; Paul Guggenheim (Switzerland), nominated by the national group of Spain; Sture Petreñ (Sweden), nominated by the national group of France; Lord McNair, nominated by the national group of Chile; and Professor (later Sir) Humphrey Waldock, nominated by the national group of the Netherlands.⁴ Lord McNair and Professor Waldock subsequently announced that they did not wish to be candidates in the election.

Sir Gerald Fitzmaurice, in addition to his eminent qualifications as a jurist, had the advantage of the convention by which each of the permanent members of the Security Council has a judge on the Court and the practice, usually but not invariably followed, that a judge who dies in office is succeeded by a judge of the same nationality. In the

¹ For a criticism of the practice, cf. Rudzinski, *loc. cit.*, pp. 98-108.

² *Security Council, Official Records*, 15th year, 864th meeting (31 May 1960), p. 17.

³ United Nations Charter, Article 20; Rules of Procedure of the General Assembly, Rules 8 (a) and 9 (a).

⁴ General Assembly Docs. A/4475—S/4479; A/4477—S/4483; A/4477 Add. 2—S/4483 Add. 2.

first ballot in the Security Council Sir Gerald Fitzmaurice received all 11 votes.¹ In the General Assembly the results of the ballot² were as follows:

Sir Gerald Fitzmaurice	.	.	86
Sture Petreñ	.	.	7
Paul Guggenheim	.	.	4

Sir Gerald Fitzmaurice thus received the necessary majority in the first ballot in each electoral body and was declared elected.

The regular election

The terms of office of Helge Klaestad (Norway), President of the Court, Sir Muhammad Zafrulla Khan (Pakistan), Vice-President of the Court, Green H. Hackworth (United States), Enrique C. Armand-Ugon (Uruguay), and Feodor I. Kojevnikov (U.S.S.R.) were due to expire on 5 February 1961, and it was accordingly necessary during the XVth Session of the General Assembly to hold an election to fill these five places.

The processes of soliciting support for candidates, discovering the intentions of other Governments, and concluding electoral bargains or understandings occupy much of the time of missions in New York in the summer preceding a regular election to the Court. This election promised to be a very open contest. Contrary to expectation and previous practice, the twenty-strong Latin American group failed to agree on a candidate who would enjoy their collective support for the seat occupied by Armand-Ugon (Uruguay) and regarded as belonging to Latin America. In addition to Cyprus, sixteen new African States would be admitted to the United Nations before the election took place. How the new members would cast their votes could only be a matter of speculation. Against this the list of candidates was comparatively short; the total number of persons nominated by national groups was only twenty-six and of these four had withdrawn by the date of the election.³ Special interest attached to the Asian seat. In 1954 there had been a very close contest between Sir Muhammad Zafrulla Khan (Pakistan) and Radhabinod Pal (India).⁴ Both were standing again: there were also two other Asian candidates in the field, Kotaro Tanaka (Japan) and Matine-Daftary (Iran). The result might be determined by the manner in which the Afro-Asian group divided. With forty-four members by the time of the election the Afro-Asian group was the largest in the United Nations.

It was at all events clear that the convention by which each of the permanent members of the Security Council has a judge on the Court would be respected. Thus Hackworth and Kojevnikov would either be re-elected or succeeded by a citizen of the United States or U.S.S.R. respectively. This issue was further clarified when Kojevnikov and Tunkin (both of the U.S.S.R.) withdrew from the election, leaving Vladimir Koretsky (U.S.S.R.) as the candidate who enjoyed the support of the Soviet Government. The United States national group, meeting in New York in late August, had nominated Philip C. Jessup,⁵ and on the day of the presidential election in the United

¹ Security Council, Verbatim Record of the 909th meeting, Doc. S/PV.909 (16 November 1960), pp. 6-10.

² General Assembly, Provisional Verbatim Record of the 915th plenary meeting, Doc. A/PV.915 (16 November 1960), p. 4.

³ *Journal of the United Nations* (16 November 1960), No. 2509, p. 4.

⁴ For a brief account, cf. Rosenne, *op. cit.*, p. 136.

⁵ Cf. Baxter, 'Procedures Employed in Connexion with the U.S. Nominations for the International Court in 1960', *American Journal of International Law*, 55 (April 1961), pp. 445-6.

States Hackworth withdrew,¹ leaving the field clear for Jessup as the only United States candidate. The President of the Court, Helge Klaestad, occupied a seat conventionally allotted to western Europe, and it was clear at an early stage that in standing for re-election he would face a strong challenge from Morelli (Italy).

The balloting commenced on 16 November and continued on 17 November. The result of the first ballot at the 909th meeting of the Security Council on 16 November was as follows:

Philip C. Jessup (U.S.A.)	11	José Luis Bustamante y Rivero (Peru)	5
Vladimir M. Koretsky (U.S.S.R.)	9	Helge Klaestad (Norway)	4
Gaetano Morelli (Italy)	7	Radhabinod Pal (India)	3
Raúl Sapena Pastor (Paraguay)	6	Enrique C. Armand-Ugon (Uruguay)	2
Kotaro Tanaka (Japan)	6	Sir Muhammad Zafrulla Khan (Pakistan)	2

The President accordingly announced that five candidates, namely Jessup, Koretsky, Morelli, Sapena Pastor and Tanaka had obtained the necessary majority, and that he would so inform the President of the General Assembly. The meeting of the Security Council was then suspended.² This was probably done for the sake of abundant caution by the President or those advising him. Since the necessary five candidates had received majorities, the Security Council could have been adjourned in the normal way. Procedurally, however, it is easier to suspend and resume a meeting than to adjourn and later call a new meeting, and at that early stage in the contest it seemed possible that the Security Council would be required again that day.

At the 915th meeting of the General Assembly,³ which had commenced concurrently with the 909th meeting of the Security Council, the result of the first ballot was as follows:

Philip C. Jessup (U.S.A.)	77	Paul Guggenheim (Switzerland)	10
Vladimir M. Koretsky (U.S.S.R.)	62	Milan Bartos (Yugoslavia)	7
Kotaro Tanaka (Japan)	51	Feodor I. Kojevnikov (U.S.S.R.)	6
José Luis Bustamante y Rivero (Peru)	42	Sture Petreñ (Sweden)	5
Sir Muhammad Zafrulla Khan (Pakistan)	42	Grigory I. Tunkin (U.S.S.R.)	3
Gaetano Morelli (Italy)	41	Ahmad Matine-Daftary (Iran)	3
Helge Klaestad (Norway)	37	Ernesto Barros Jarpa (Chile)	3
Raúl Sapena Pastor (Paraguay)	37	Green H. Hackworth (U.S.A.)	3
Radhabinod Pal (India)	31	Erik Castreñ (Finland)	3
Enrique C. Armand-Ugon (Uruguay)	14	Raúl Fernandes (Brazil)	1
Joseph Nisot (Belgium)	11	Manuel Elicio Flor (Ecuador)	1
		Wirjono Prodjodikoro (Indonesia)	1

The President accordingly announced that Jessup and Koretsky had received absolute majorities.

The President referred to Rule 96 of the Rules of Procedure of the General Assembly, which reads as follows:

'When two or more elective places are to be filled at one time under the same conditions, those candidates obtaining in the first ballot the majority required shall be elected. If the number of candidates obtaining such majority is less than the number of persons

¹ General Assembly Doc. A/4465 Rev. 1/Add. 1—S/4474 Rev. 1/Add. 1 (7 November 1960).

² Security Council, Verbatim Record of the 909th meeting, Doc. S/PV.909 (16 November 1960), p. 14.

³ General Assembly, Provisional Verbatim Record of the 915th plenary meeting, Doc. A/PV.915 (16 November 1960).

or Members to be elected, there shall be additional ballots to fill the remaining places, the voting being restricted to the candidates obtaining the greatest number of votes in the previous ballot, to a number not more than twice the places remaining to be filled; provided that, after the third inconclusive ballot, votes may be cast for any eligible person or Member. If three such unrestricted ballots are inconclusive, the next three ballots shall be restricted to the candidates who obtained the greatest number of votes in the third of the unrestricted ballots, to a number not more than twice the places remaining to be filled, and the following three ballots thereafter shall be unrestricted, and so on until all the places have been filled.'

The President stated that in accordance with this rule the next ballot would be restricted to the six candidates who had received the largest number of votes after the two candidates who received an absolute majority, namely Tanaka, Bustamante y Rivero, Sir Muhammad Zafrulla Khan, Morelli, Klaestad and Sapena Pastor.

After the restricted ballot had begun, the Permanent Representative of India rose on a point of order. He cited Rule 151 of the Rules of Procedure of the General Assembly which provides that 'the election of the members of the International Court of Justice shall take place in accordance with the Statute of the Court'. He claimed that the Rules of Procedure of the General Assembly could not apply since there were non-members of the United Nations participating in the elections, that the Statute of the Court contained no provision for restricted ballots and that there was no precedent binding on the Assembly for the application of Rule 96 to elections to the Court. The President in reply pointed out that the effect of Rule 151 was simply to provide for the procedure whereby an absolute majority is sought both in the Security Council and in the Assembly, and that Rule 96 had been consistently followed in the past and never challenged. The representative of El Salvador requested the President to apply Rule 73, which provides that a point of order shall be immediately decided by the President and any appeal against the ruling shall be immediately put to the vote. The President accordingly announced that in the view of the Chair, in accordance with precedent and past practice, Rule 96 of the Rules of Procedure applied to elections to vacancies in the International Court of Justice, that this view had been challenged by the representative of India and that he accordingly asked the Assembly to vote on the question whether Rule 96 applied. The Assembly decided by 47 votes to 27, with 25 abstentions, that Rule 96 did not apply. The result of the restricted ballot was not read out and the Assembly proceeded to a series of unrestricted ballots. In these ballots Pal (India) received a declining series of votes.

The result of the first of the unrestricted ballots following the Indian intervention was as follows:

Kotaro Tanaka (Japan)	56	Milan Bartos (Yugoslavia)	3
José Luis Bustamante y Rivero (Peru)	48	Paul Guggenheim (Switzerland)	2
Gaetano Morelli (Italy)	43	Enrique C. Armand-Ugon (Uruguay)	2
Sir Muhammad Zafrulla Khan (Pakistan)	34	Ahmad Matine-Daftary (Iran).	2
Helge Klaestad (Norway)	33	Joseph Nisot (Belgium)	1
Raúl Sapena Pastor (Paraguay)	31	Sture Petreñ (Sweden)	1
Radhabinod Pal (India)	28	Wirjono Prodjodikoro (Indonesia)	1

Kotaro Tanaka (Japan) thus received an absolute majority, and the meeting was suspended.

When the 915th meeting of the General Assembly was resumed on 17 November, three candidates had thus obtained the necessary majority of votes in the General

Assembly and balloting was for the remaining two places. In the first ballot of the resumed meeting¹ the voting was:

José Luis Bustamante y Rivero (Peru)	46	Manuel Elicio Flor (Ecuador)	1
Gaetano Morelli (Italy)	40	Enrique C. Armand-Ugon (Uruguay)	1
Helge Klaestad (Norway)	28	Ahmad Matine-Daftary (Iran)	1
Raúl Sapena Pastor (Paraguay)	28	Joseph Nisot (Belgium)	1
Sir Muhammad Zafrulla Khan (Pakistan)	17	Wirjono Prodjodikoro (Indonesia)	1
Radhabinod Pal (India)	13	Sture Petreñ (Sweden)	1
Paul Guggenheim (Switzerland)	5	Max Sørensen (Denmark)	1

No candidates received the required majority.

In the second ballot the voting was:

José Luis Bustamante y Rivero (Peru)	53	Radhabinod Pal (India)	11
Gaetano Morelli (Italy)	45	Paul Guggenheim (Switzerland)	4
Raúl Sapena Pastor (Paraguay)	29	Joseph Nisot (Belgium)	3
Helge Klaestad (Norway)	27	Max Sørensen (Denmark)	1
Sir Muhammad Zafrulla Khan (Pakistan)	16	Manuel Elicio Flor (Ecuador)	1
		Wirjono Prodjodikoro (Indonesia)	1

Bustamante y Rivero thus received the required majority.

In the third ballot the voting was:

Gaetano Morelli (Italy)	56	Sir Muhammad Zafrulla Khan (Pakistan)	5
Helge Klaestad (Norway)	24	Raúl Sapena Pastor (Paraguay)	3
Radhabinod Pal (India)	8	Ahmad Matine-Daftary (Iran)	1

Morelli received the required majority.

The position, therefore, was that Jessup, Koretsky, Tanaka, Bustamante y Rivero and Morelli had received the necessary majorities in the General Assembly. The President then announced that he had been informed by the President of the Security Council that in that body Jessup, Koretsky, Morelli, Sapena Pastor and Tanaka had received the necessary majority. Accordingly, Jessup, Koretsky, Morelli and Tanaka had received the necessary majorities in both bodies, and it would be necessary for the General Assembly to vote again for the fifth vacancy. The General Assembly was then adjourned.

Fifteen minutes later the 909th meeting of the Security Council was resumed.² The President announced that there was agreement between the General Assembly and the Security Council on the election of Jessup, Koretsky, Tanaka and Morelli, and that in accordance with Rule 61 of the Provisional Rules of Procedure of the Security Council it would be necessary to hold a new election to fill the fifth vacancy. Accordingly the 909th meeting of the Security Council was declared closed and the 910th meeting was immediately opened. In the ballot for the remaining place Bustamante y Rivero received 10 votes and Sapena Pastor 1.³

The 916th meeting of the General Assembly⁴ was then opened to proceed to ballot

¹ General Assembly, Provisional Verbatim Record of the 915th plenary meeting (continued), Doc. A/PV.915 (continued) (17 November 1960).

² Security Council, Verbatim Record of the 909th meeting (continued), Doc. S/PV.909 (continued) (17 November 1960).

³ Security Council, Verbatim Record of the 910th meeting, Doc. S/PV.910 (17 November 1960).

⁴ General Assembly, Provisional Verbatim Record of the 916th meeting, Doc. A/PV.916 (17 November 1960).

for the one remaining vacancy. The representative of Peru, on an alleged point of order, asked the President whether he felt he could now read out the letter transmitted from the Security Council, since the vote had already taken place there and Bustamante y Rivero had secured a majority of votes in that body. The President replied that the practice which had invariably been followed was that the Security Council and the Assembly voted quite independently of one another and without prior knowledge of the results of one another's votes. It would be contrary to that practice for him to comply with the request made by the representative of Peru, but the latter had already complied with it himself. The result of the ballot was:

José Luis Bustamante y Rivero (Peru)	66	Radhabinod Pal (India)	3
Raúl Sapena Pastor (Paraguay)	13	Helge Klaestad (Norway)	2
Sir Muhammad Zafrulla Khan (Pakistan)	4	Paul Guggenheim (Switzerland)	1

Bustamante y Rivero thus received the necessary majority in the General Assembly. The President then announced that Bustamante y Rivero had also received a majority in the Security Council and had accordingly been duly elected.

The 910th meeting of the Security Council was then resumed for the purpose of hearing from its President that Bustamante y Rivero had received the necessary majority in the General Assembly, and that the election had accordingly been completed.¹

Evaluation of the regular election

From the point of view of procedure, the only interesting episode in the election was the decision of the General Assembly by 47 votes to 27 with 25 abstentions that Rule 96 of the Rules of Procedure should not apply. Only twenty-seven or less than one-third of the members of the General Assembly were prepared to put on record—a roll-call vote had been demanded—their view that the rule did apply. A general unwillingness to apply the rules, and a widespread inclination to take refuge in neutrality or abstention where a procedural point is in issue, are well-known characteristics of the United Nations at the present time. Nevertheless, there were some arguments to support the view of India. Rudzinski has called the practice of applying Rule 96 to the election of judges 'questionable'.² On practical grounds it may be contended that a restricted ballot or a series of restricted ballots, while an admirable means of saving time when the seat to be filled is recognized as belonging to a particular region and only candidates from that region are left in the field, may cause great difficulties in other situations, e.g. a European and an Asian might be left as the only candidates for a seat belonging to Latin America, or when more than one seat remain to be filled, pre-election understandings between Governments and the governing conventions might be upset.

Article 8 of the Statute of the Court requires the General Assembly and the Security Council to proceed independently of one another in elections to the Court. Little meaning attaches to the word 'independently'. Short of confining members of delegations in the Security Council to their chamber in the fashion of a common jury, there is no means of preventing the result of a ballot in that body from at once becoming widely known in the corridors and in the General Assembly hall. When the representative of Peru went to the rostrum of the General Assembly to announce that Bustamante

¹ Security Council, Verbatim Record of the 910th meeting, Doc. S/PV.910 (17 November 1960).

² Cf. Rudzinski, loc. cit., pp. 108-11.

y Rivero had received the necessary majority in the Security Council, he was guilty only of disregarding the polite fiction that each body proceeds without knowledge of the course of balloting in the other. The holding of a ballot in the eleven-member Security Council takes only a fraction of the time required in the General Assembly and the result will therefore be known to many before the ballot, even if being taken concurrently in the General Assembly, has been completed in the latter.

That the results of the early ballots in the Security Council have a considerable effect on the subsequent proceedings in the General Assembly admits of no doubt. By the time an election starts, most delegations will be aware, if they have been sufficiently zealous in taking soundings, that certain members of the Security Council are committed to vote for A, that others will in no circumstances vote for B, that some favour C but have discretion to switch support to D if it is necessary to do so to retain the seat for a particular group, and so on. Working from known factors such as these, it is often possible for the initiated to determine with something approaching certainty how each of the eleven members of the Security Council has voted in a particular ballot. Where it can be determined how a particular member voted, this may be at least a clue to the voting performance in the General Assembly of the group to which he belongs. For these reasons the result of a ballot in the Security Council is likely to have a considerable effect in the General Assembly on those delegations, who are not committed to support particular candidates, who have discretion to switch support to avoid a deadlock or to ensure the election of a candidate from a particular group, or are simply glad of a lead.

It is therefore not surprising that in the election under discussion the result of the first ballot in the Security Council set the pattern for the subsequent proceedings. The two candidates from States which are permanent members of the Security Council, Jessup and Koretsky, received large majorities. For the Asian seat Tanaka (Japan) had a comfortable lead over Pal (India) and Sir Muhammad Zafrulla Khan (Pakistan) and kept the lead in the subsequent ballot in the General Assembly. For the west European seat the Security Council gave 7 votes to Morelli (Italy) and 4 to Klaestad (Norway). Though the result of the first ballot in the General Assembly was closer, thereafter Morelli steadily increased his lead over Klaestad. As has been explained, the United Nations was confronted with an unusual situation in that there was no agreed Latin-American candidate. The fact that Armand-Ugon (Uruguay) received only two votes in the Security Council and the Brazilian, Chilean and Ecuadorean candidates none suggested that the contest would be between Sapena Pastor (Paraguay) and Bustamante y Rivero (Peru), as indeed proved to be the case. The result in the Security Council was, however, very close—6 votes for Sapena Pastor and 5 for Bustamante y Rivero. It was in the General Assembly that Bustamante y Rivero gained the lead over Sapena Pastor, which ultimately brought him victory.

A fact that should not go unremarked is that of the three members of the Court standing for re-election, Helge Klaestad, President of the Court, Sir Muhammad Zafrulla Khan, Vice-President of the Court, and Enrique Armand-Ugon, none was successful. The idea that a member of the Court should not be re-elected is not new.¹ On this occasion it was without doubt powerfully reinforced by the widely held view at the United Nations that given the great increase in membership and the impossibility without Charter amendment of expanding such bodies as the Security Council, the Economic and Social Council and the Court, existing seats should rotate among as many countries as the governing conventions permit.

¹ Cf. Rosenne, *op. cit.*, p. 130.

The election brought no change in the representation of continents on the Court. Despite the great influx of new African members into the United Nations there was no increase in the representation of Africa on the Court. There could not be, because there was no African candidate in the field. The African States, old and new, can be classified in a variety of ways, and at a future election national groups and the two electoral bodies will doubtless have to reconsider 'the representation of the main forms of civilisation and of the principal legal systems of the world'¹ on the Court in the light of the expansion in the membership of the United Nations.

¹ Statute of the International Court of Justice, Article 9.

LAWLESS v. THE GOVERNMENT OF IRELAND (SECOND PHASE)*

By A. H. ROBERTSON

I

ON 1 July 1961 the European Court of Human Rights delivered its first Judgment on the merits of the case. It found in favour of the Government of Ireland as respondent in an action originally brought before the Commission of Human Rights by Gerard Richard Lawless for wrongful detention, allegedly in contravention of the European Convention on Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950.

The facts of the case were as follows. Lawless was arrested on 11 July 1957 and was detained without trial in a military detention camp (the Curragh) between 13 July and 11 December 1957 in pursuance of an Order made by the Minister of Justice under Section 4 of the Offences Against the State (Amendment) Act, 1940. This Act empowered the Government to arrest and detain persons without trial when it considered that the exercise of such powers was necessary to preserve peace and public order and after it had made a proclamation to that effect. Such a proclamation had been made on 5 July 1957, after a series of incidents disturbing the peace, and came into force on 8 July; it was in accordance with the powers thus conferred on the Government that Lawless was arrested as being a suspected member of an illegal organization, namely the Irish Republican Army.

On 8 September 1957 Lawless exercised the right conferred upon him by Section 8 of the 1940 Act to apply to have the continuation of his detention considered by the Detention Commission which had been set up by the Government in accordance with the Act, and appeared before that Commission on 17 September 1957, assisted by a solicitor and counsel. The following day, however, he also took *habeas corpus* proceedings in the High Court under Article 40 of the Irish Constitution to test the legality of his detention under the relevant provisions of the Constitution and of Irish law. The Detention Commission thereupon adjourned its proceedings under the 1940 Act pending the outcome of the *habeas corpus* proceedings in the ordinary courts.

In the High Court the Commandant of the military prison camp where Lawless was detained opposed the motion for a *habeas corpus* order, relying upon the order for the detention of Lawless made by the Minister for Justice under the 1940 Act. The High Court delivered Judgment on 11 October 1957, upholding the cause of detention shown by the Commandant and rejecting the application for *habeas corpus*.

On 14 October 1957 Lawless appealed to the Supreme Court, invoking not only the Constitution and laws of the Republic but also the provisions of the European Convention on Human Rights. The Supreme Court dismissed the appeal on 6 November 1957, and on 3 December 1957 delivered a reasoned Judgment stating the grounds for its dismissal of the appeal, pointing out that (a) the constitutional validity of the Offences Against the State (Amendment) Act, 1940, was not open to question, and

(b) the European Convention on Human Rights did not form part of the municipal law of the Irish Republic.

Meanwhile, on 8 November 1957—that is two days after the announcement of the Supreme Court's rejection of his appeal—Lawless transmitted an application to the European Commission of Human Rights. In the application he alleged that his arrest and detention under the 1940 Act without charge or trial violated the Convention and claimed:

- (a) immediate release from detention;
- (b) payment of compensation and damages for his detention; and
- (c) payment of all the costs and expenses of, and incidental to, the proceedings in the Irish Courts and before the Commission to secure his release.

Shortly afterwards the Detention Commission resumed its consideration of the case under Section 8 of the 1940 Act and held hearings for that purpose on 6 and 10 December 1957. On the latter date, at the invitation of the Attorney-General, Lawless, in person before the Detention Commission, gave a verbal undertaking that he would not 'engage in any illegal activities under the Offences Against the State Acts, 1939 and 1940', and on the following day an Order was made by the Minister for Justice, under Section 6 of the 1940 Act, releasing him from detention.

This was notified to the European Commission of Human Rights by his solicitor in a letter dated 16 December 1957. The letter at the same time stated that he intended to continue the proceedings before the Commission with regard to (a) the claim to compensation and damages for his detention, and (b) the claim to be reimbursed all costs and expenses in connexion with the proceedings undertaken to obtain his release.

The whole basis for the application to the Commission was that the arrest and detention of Lawless were in contravention of Article 5 of the Convention on Human Rights, which provides that everyone has the right to liberty and security of person and that no one shall be deprived of his liberty save in certain circumstances which are specifically set out, such as lawful detention after conviction by a competent court. The Commission of Human Rights was unanimous in holding that arrest and detention without trial under the 1940 Act were not in accordance with Article 5 of the Convention.

Article 15 of the Convention, however, provides as follows:

'In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.'

Moreover, any party availing itself of this right of derogation is required to inform the Secretary-General of the Council of Europe of the measures taken and the reasons therefor. The Government had in fact informed the Secretary-General of the measures taken in a letter of 20 July 1957; the Commission, while of opinion that this letter did not indicate with sufficient clearness the reasons for the derogation, nevertheless accepted this letter as complying with the requirements of Article 15.

The crucial question, therefore, was whether or not at the relevant dates there existed 'a public emergency threatening the life of the nation' within the meaning of Article 15. The Commission concluded, by a majority of 9 votes to 5, that 'in making a determination on 5 July 1957, that there existed in the Republic of Ireland a public emergency threatening the life of the nation, the Respondent Government did not go beyond the proper margin of discretion allowed to it under Article 15, paragraph (1)'. This decision then led to consideration of the further question: whether the arrest and

detention of persons without trial was a measure 'strictly required by the exigencies of the situation'. This question the Commission also answered in the affirmative, by a majority of 8 votes to 6, so that the conclusion of the Commission on the issue as a whole was that the facts found did not disclose a breach of the Convention by the Irish Government. The report of the Commission to this effect was transmitted to the Committee of Ministers of the Council of Europe on 1 February 1960.

On 12 April 1960, however, the Commission, acting in accordance with the provisions of Articles 32 and 48 of the Convention, referred the case to the Court of Human Rights on the ground that it raised issues which were of fundamental importance in the application of the Convention. The Commission pointed out that it had been divided, with a substantial minority vote, on two questions arising under Article 15; it had therefore decided to refer the case to the Court for an authoritative decision. At the same time, the Commission pointed out that its decision to refer the case to the Court was not to be understood as qualifying in any way its opinion that the facts found did not disclose any breach by the Irish Government of its obligations under the Convention. On the contrary, the Commission asked the Court to confirm the opinions expressed by the Commission on the various matters dealt with in its report and to find that no breach of the Convention by the Government had been established.

When the case came before the Court, the Irish Government raised certain preliminary objections on questions of procedure. Some of these it did not press but to two of them it attached considerable importance. The first of these related to the communication by the Commission of its report to the applicant, which the Government alleged contravened the requirement of the Convention that the report should be confidential. The second major objection was to the action of the Commission in inviting the applicant's written observations on the report, with a view to transmitting them, if thought appropriate, to the Court; this, in the Government's submission, attempted to modify by an oblique procedure the provision in the Convention to the effect that only Governments and the Commission may appear in proceedings before the Court.

On 14 November 1960 the Court gave Judgment on the preliminary objections and held that the Commission was entitled to communicate its report to the applicant with the proviso that it must not be published; moreover, it decided that the Commission was 'entitled of its own accord, even if it does not share them, to make known the applicant's views to the Court, as a means of throwing light on the points at issue'.¹ It then went on to consider the merits of the case.

Even so, a new procedural point came up at the opening of the hearings on the merits. Between the date of the Judgment on the preliminary objections (14 November 1960) and the date of the hearings on the merits (7-11 April 1961), further written pleadings were exchanged in the form of a 'Statement' of the Commission (commenting on the Counter-Memorial of the Irish Government filed in August 1960) and 'Observations' of the Government in reply to this Statement. The Commission, in preparing the Statement, considered that it was entitled to submit to the Court the written observations of the applicant on its own earlier report—this evidently in reliance on the Court's decision that 'the Commission was entitled of its own accord . . . to make known the applicant's views to the Court . . .'. Accordingly, it included in the Statement a lengthy passage of nearly twenty pages of the applicant's views; its impartiality in doing so was

¹ A fuller account of the preliminary objections and of the Judgment thereon is given in this *Year Book*, 36 (1960), pp. 343-54. For an account of the structure, competence and procedure of the Court, see Robertson, 'The European Court of Human Rights', *American Journal of Comparative Law*, vol. 9, No. 1.

shown by the fact that these views were in some respects sharply critical of the Commission's own findings and of the reasoning of some of its members. The Government again objected that this was improper. The Court,¹ in a separate decision of 7 April, ruled that the passage in the Commission's statement reproducing the applicant's views was not, at that stage, to be considered as part of the proceedings in the case; nevertheless, the Commission could itself 'take account of' the applicant's views and, implicitly, make use of them in the oral hearings. The Court thus gave a rather restrictive interpretation of its own earlier Judgment on the preliminary objections: it appears that the Commission may 'take account' (in French *faire état*) of the applicant's views and summarize or quote them in the oral hearings, but not reproduce them in the written pleadings. This statement may perhaps be amplified as follows. The Court's decision would appear to mean that it is unwilling to allow the Commission simply to reproduce and submit to it extensive extracts from the applicant's own statement—in which case the role of the Commission is no more than that of a postbox; the Commission may, however, make use of the applicant's views (even though it does not agree with them) in presenting relevant arguments to the Court—in which case it plays an active role on its own responsibility, even though with the assistance of the individual applicant.²

In fact, during the oral hearings, the President of the Commission, in his capacity as principal delegate, informed the Court orally of the applicant's point of view on the main issues of the case and thus ensured that the Court was in possession of the information necessary to reach its conclusions in full knowledge of all relevant arguments.

II

On the merits of the case, there were three main issues for decision by the Court, which were the same as those considered by the Commission:

- (1) were the arrest and detention of Lawless in contravention of Article 5 of the Convention?
- (2) if so, could the Government justify its action as a derogation permitted by Article 15? Was there in Ireland in the summer of 1957 'a public emergency threatening the life of the nation'?
- (3) if so, was the arrest and detention of persons without trial a measure 'strictly required by the exigencies of the situation'?

Before coming to consider these questions, however, the Court still had another hurdle to jump, because the Irish Government raised a plea in bar based on Article 17 of the Convention.

¹ Under Article 43 of the Convention, the Court hears cases in a Chamber of seven judges. A judge who is the national of any State party to the proceedings sits *ex officio*; the remainder are chosen by lot. The Chamber hearing the *Lawless* case consisted of: R. Cassin (President) and G. Maridakis, E. Rodenbourg, R. McGonigal (*ex officio*), G. Balladore Pallieri, E. Arnalds and K. F. Arik.

² The difference between the Court's more liberal attitude in November 1960 and the more restrictive interpretation in April 1961 appears to be due, at least in part, to a difficulty of translation. The earlier Judgment, in French, said that: 'la Commission a le droit . . . de faire état devant la Cour sous sa propre responsabilité des considérations du requérant. . . .' This was translated, on the earlier occasion, as: 'the Commission . . . is entitled of its own accord . . . to make known the applicant's views to the Court. . . .' In the Judgment of 7 April 1961 the Court still held that the Commission was entitled *de faire état* of the applicant's views, but this was translated as 'to take [them] into account'. *Faire état* is, indeed, a vague and nebulous expression. But the Court was careful to point out that only the French text was authentic.

Article 17

This article provides as follows:

'Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.'

The Irish Government claimed that Lawless was a member of or associated with the Irish Republican Army which had been banned precisely because it aimed at the destruction of the rights and freedoms set forth in the Convention within the meaning of Article 17; the Convention, however, must not be used as a pretext to permit him to carry on such activities; therefore it was claimed that he or any other person or persons in a similar situation could not be permitted to rely on the Convention at all. In support of this contention, the Government relied on the decision of the Commission on the application of the German Communist Party.¹

The Commission in reply contended that the general purpose of Article 17 is to prevent totalitarian groups from exploiting in their own interest the principles enunciated by the Convention; but that to achieve that purpose it is not necessary to take away every one of the rights and freedoms guaranteed in the Convention from persons found to be engaged in activities aimed at the destruction of any of those rights and freedoms; that Article 17 therefore related essentially to the exercise of those rights (such as freedom of expression and freedom of assembly) which could themselves be used for political activities aimed at the destruction of human rights in general; and that the present case was thus not comparable to that of the German Communist Party and Article 17 therefore did not apply.

On this point, the Court rejected the submission of the Irish Government, holding that the purpose of Article 17 was to make it impossible for individuals to avail themselves of the rights set forth in the Convention in order to destroy human rights and freedoms, but that this could not be construed *a contrario* as depriving them of the fundamental individual rights guaranteed by Articles 5 and 6; Lawless, moreover, had not attempted to rely on the Convention in order to justify or perform improper acts but merely to avoid detention without trial. Article 17 therefore did not apply to his case.

Article 5

The relevant passages of Article 5 were as follows:

'(1) Everyone has the right to liberty and security of person.

No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a). . . .

(b). . . .

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

¹ The German Communist Party had appealed to the Commission in 1957 against a decision of the Federal Constitutional Court of 17 August 1956 that had declared the Party illegal, dissolved it and confiscated its assets; the Commission declared the application inadmissible on the ground that it fell directly within the provisions of Article 17. *Yearbook of the European Commission of Human Rights* (1955-7), pp. 222-5.

'(2)

'(3) Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.'

As mentioned above, the Commission of Human Rights was unanimous in holding that arrest and detention without trial under the 1940 Act were not in accordance with Article 5. The Government nevertheless challenged this in the proceedings before the Court, on the ground that paragraph 1 (c) of Article 5 permits 'the lawful arrest or detention of a person . . . when it is reasonably considered necessary to prevent his committing an offence . . .' and that Lawless had in fact been detained precisely for this reason. The Commission in reply argued that it was necessary to look at the whole of paragraph 1 (c), which permits the arrest or detention of a person, in order to prevent his committing an offence, *when this is effected for the purpose of bringing him before the competent legal authority*. Paragraph 3 of Article 5, moreover, the Commission argued, made it perfectly clear that arrest or detention as authorized in paragraph 1 must be only a preliminary stage before the person detained is brought before a judge for trial. In reply to this argument, the Government claimed that the clear meaning of Article 5 could be found in the *travaux préparatoires*. The original text of paragraph 1 (c) of Article 5 (which had been proposed by the United Kingdom) read:

'the lawful arrest or detention of a person effected for the purpose . . . &c. . . or which it is reasonably considered necessary to prevent his committing an offence. . . .'

This showed, in the Government's submission, that the words 'effected for the purpose of bringing him before the competent legal authority' related only to cases of reasonable suspicion that an offence had been committed and *not* to cases of reasonable suspicion that an offence was about to be committed. Moreover, as regards paragraph 3 of Article 5, the earlier text limited this *expressis verbis* to cases of arrest or detention 'on a charge of having committed a crime'. Admittedly both texts had subsequently been altered but, the Government claimed, this was only done in the course of final comparison of the English and French texts and revision of the translation. No intention to change the sense of the earlier text could be traced in the *travaux préparatoires*. Therefore it was argued that the clear sense of the earlier text must be held to prevail over the Commission's interpretation of the final ambiguous text.

As the Commission pointed out, the *travaux préparatoires* of Article 5, when closely examined, do not appear to bear out the Government's deduction from them. The Court, however, did not find it necessary to examine the *travaux préparatoires*, for it upheld the Commission's interpretation of Article 5 on the ground that the plain and natural meaning of the words used was that which the Commission gave to them; and it further pointed out that the construction advocated by the Government would open the door wide to arrest and detention on suspicion without the requirement of bringing to trial. This meant that in the view of the Court the arrest and detention of Lawless were incompatible with Article 5,¹ and the Court then went on to examine whether the action of the Government could be justified by reason of its power to derogate under Article 15.

¹ The applicant had also claimed that his arrest and detention contravened Article 7 of the Convention, which prohibits the retroactive application of the law. The Commission having rejected this contention, the Irish Government naturally did not re-open it before the Court, and the latter upheld the view of the Commission.

Article 15

The most interesting part of the case related to the validity of the Irish Government's derogation under the provisions of Article 15. If the derogation was validly effected and applied, then the application would fail even though the applicant's arrest and detention were inconsistent with the provisions of Article 5.

The full text of Article 15 is as follows:

- '(1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
- '(2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
- '(3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.'

'In time of war or other public emergency threatening the life of the nation' are strong words. Ireland was not at war in the summer of 1957; had there been a 'public emergency threatening the life of the nation'? The Commission had answered this question in the affirmative, but by a majority vote of 9 votes to 5. The Court now had to decide.

In the proceedings before the Commission, the Irish Government had cited a series of facts from which they deduced the existence of a public emergency threatening the life of the nation. The question of general principle which arose was whether the Court could now, so to speak, substitute itself for the Government and pass judgment on the conclusions that the latter had drawn.

This, the Government argued, was outside the competence of the Commission or the Court:

'No machinery is provided under the Convention to enable a Government to take the opinion of the Commission or of the Court as to the existence of a state of emergency, or as to the measures which are necessary to deal with such an emergency, and it is inconceivable that a Government acting in good faith should be held to be in breach of their obligations under the Convention merely because their appreciation of the circumstances which constitute an emergency, or of the measures necessary to deal with the emergency, should differ from the views of the Commission or of the Court.'

The Government recognized the danger that if a determination of this sort were left to the sole discretion of individual Governments, then a Government which wished to embark on a totalitarian policy might falsely claim the existence of a state of emergency and thus improperly suspend a number of guarantees. But this danger was countered by Article 18 of the Convention, which reads:

'The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.'

It would therefore be possible for the Court to determine, in the light of Article 18, whether or not a Government was acting in good faith. The Irish Government therefore asked the Court to declare that

'if, having regard to Article 18, the facts show that the Government acted in good faith, their appreciation of the situation or of the measures necessary to deal with it ought not

to be set aside in favour of the appreciation of some other body, whether the Commission or the Court, not charged with the duty of maintaining law, order and good government in the territory of that Government.'

The point of view of the Commission was very different. It had indeed already come up against this problem in a different context, that is to say in the case brought by Greece against the United Kingdom relating to the emergency measures in Cyprus, with respect to which the British Government had made a similar derogation under Article 15 of the Convention. The Commission had then laid down the following rules:

- '(a) the Commission always has the competence and the duty under Article 15 to examine and pronounce upon a Government's determination of the existence of a public emergency threatening the life of the nation for the purpose of that Article; but
- '(b) some discretion and some margin of appreciation must be allowed to a Government in determining whether there exists a public emergency which threatens the life of the nation and which must be dealt with by exceptional measures derogating from its normal obligations under the Convention.'

This led to what came to be known as the doctrine of 'margin of appreciation'. The Commission could and must look behind the Government's own appraisal of the situation; nevertheless, the Government should be allowed a margin of discretion, having regard to its responsibilities for keeping law and order and to the fact that it was likely to have at its disposal sources of information which could not be available to the Commission. The President of the Commission explained this to the Court on 10 April 1961, as follows:

'The concept behind this doctrine is that Article 15 has to be read in the context of the rather special subject matter with which it deals: the responsibilities of a Government for maintaining law and order in times of war or public emergency threatening the life of the nation. The concept of the margin of appreciation is that a Government's discharge of these responsibilities is essentially a delicate problem of appreciating complex factors and of balancing conflicting considerations of the public interest; and that, once the Commission or the Court is satisfied that the Government's appreciation is at least on the margin of the powers conferred by Article 15, then the interest which the public itself has in effective Government and in the maintenance of order justifies and requires a decision in favour of the legality of the Government's appreciation.'

This view was reaffirmed by the Commission in the *Lawless* case but strongly attacked by the Irish Government, which asked the Court to declare that the Commission had 'erred in principle in its approach to the application of Article 15'.

The applicant, of course, took a wholly different view. He argued before the Commission—and the latter so informed the Court—that before a Government is entitled to make a derogation under Article 15 it has the obligation of satisfying the Commission first as to the existence of the emergency, and secondly that neither the ordinary courts nor any special criminal courts were able to function and deal with the threat to the life of the nation. The burden of proof, he argued, is on the Government and it should produce evidence that can satisfy the Commission or the Court objectively—such as sworn evidence by a responsible minister or other public official, which could be tested in cross-examination. The applicant in fact submitted a sworn affidavit by the Lord Mayor of Dublin in support of his view (that there was not an emergency threatening the life of the nation) which, he alleged, remained uncontroverted. He proposed four objective tests to determine whether such an emergency existed: whether (1) the Government and Parliament, (2) the courts and (3) the public administration were

functioning normally; and (4) had there been any major upheaval or disaster in the country? He contended that the answers to these questions showed clearly that no emergency existed of the gravity that had been alleged.

The Commission's reply to this before the Court was that there was little difference of opinion as to the general facts of the situation; the dispute was as to the proper interpretation of the facts. In order to interpret them, it maintained its doctrine of margin of appreciation and left it to the Court to decide which approach was the right one.

On the general issue of principle, the Court decided against the Government's view that once its good faith was established neither the Commission nor the Court could look into the matter further. It held that 'it is for the Court to decide whether the conditions laid down in Article 15 for the exercise of the exceptional right of derogation have been fulfilled in the present case' and again 'the Court must determine whether the facts and circumstances which led the Irish Government to make their proclamation of 7 July 1957, come within this conception' (i.e. of an emergency threatening the life of the nation). Nevertheless, on the facts of the case, the Court held that the Government was justified in the conclusion which it reached: the existence at the time of a public emergency threatening the life of the nation was reasonably deduced by the Irish Government from a combination of several factors: the existence of a secret army engaged in unconstitutional activities and using violence to attain its ends; secondly, the fact that this illegal army also operated outside the territory of the State, thus jeopardizing relations between Ireland and its northern neighbour; and, thirdly, the steady and alarming increase in terrorist activities during the autumn of 1956 and the first half of 1957. In this respect, therefore, the Court endorsed the findings of the Commission in favour of the Irish Government; as regards the 'margin of appreciation' theory, the Court did not endorse this *expressis verbis*, but its whole approach to the matter was consistent with that of the Commission.

It then became material to inquire whether the arrest and detention of persons without trial were measures 'strictly required by the exigencies of the situation'. The Commission had answered this question in the affirmative, but only by the narrow majority of 8 votes to 6. The eight members forming the majority,

'taking into account the particular danger to be met, the alternative measures available to the Government, the safeguard provided by the right of the Applicant to have the continuation of his detention considered by the Detention Commission and the Government's practice of releasing any detained person willing to give an undertaking in regard to his future conduct, concluded that in adopting the measure of detention without trial in the special circumstances obtaining in Ireland the Respondent Government did not go beyond its proper margin of appreciation under Article 15 of the Convention.'

Of the remaining six members of the Commission, five had already held that the facts did not disclose the existence of a public emergency threatening the life of the nation; the remaining member, while accepting the existence of such an emergency, thought that the Irish Government could have adopted less extreme measures than arrest and detention without trial.

The Government in its counter-memorial did not adduce any new arguments or evidence, because of its claim that, once the good faith of a Government had been established, the Commission and the Court were not entitled to set aside its appreciation of the situation and of the measures necessary to deal with it.

The Court, after asserting its right to examine whether the Government's appreciation was justified, came to the conclusion that it was. It cited the facts that the ordinary

processes of law had not been able to check the growing danger in the Republic; that the ordinary criminal courts, and even special and military courts, could not suffice to restore law and order; the great difficulty of collecting evidence against persons involved in the activities of the I.R.A.—partly due to fear of reprisals; and the fact that the sealing of the border (which might have been used to prevent raids into Northern Ireland) 'would have had extremely serious repercussions on the population as a whole, beyond the extent required by the exigencies of the emergency'. The Court also pointed out that the emergency measures were subject to a number of safeguards, including reports to Parliament, the right of the Parliament to revoke the proclamation bringing into force the Offences Against the State (Amendment) Act, the existence of a Detention Commission and the release of persons who gave an undertaking to respect the law. Moreover, the emergency measures were not applied abusively. Having thus admitted the justification of the emergency measures in general, the Court went on to inquire whether they were properly applied in the particular case of *Lawless*, and reached the conclusion that they were.

A final point arose under paragraph 3 of Article 15. The applicant claimed that the Irish Government's communication to the Secretary-General of the Council of Europe of 20 July 1957 was not an effective notice of derogation within the meaning of that paragraph because it did not state that it was a notice of derogation and did not adduce the existence of a state of emergency threatening the life of the nation; moreover, he claimed that, even if it was effective, it had only been made public in Ireland on 23 October 1957 and could not be enforced with respect to events occurring before that date.¹ On grounds of principle, this last argument was not without some force. Everyone should be in a position to know whether the rights to which he is entitled under the Convention have been modified by a Government's recourse to its exceptional power to derogate from the Convention under Article 15. For more than three months after the emergency measures were in force, it was not known in Ireland that the Government had made a derogation under Article 15. If a derogation published in October was effective in July, could it not be argued that its application was retroactive? On the other hand, it could be said on behalf of the Government that its proclamation bringing into force the exceptional power to detain persons without trial under the 1940 Act had been brought to the attention of everyone in Ireland by being duly promulgated on 5 July 1957.

The Court held that the Government's communication, whatever its exact wording, had in fact given the Secretary-General sufficient information about the measures taken and the reasons therefor; and that the Convention did not require publication in Ireland of the notice of derogation, but merely its communication to the Secretary-General of the Council of Europe.

III

It is curious that of all the many and complex arguments used in this case, the Irish Government—adopting perhaps the habits of one of their near neighbours—had lost practically every battle but the last. It had objected to the communication of the Commission's report to the applicant and to the Commission's proposal to inform the Court of the applicant's views thereon. Subsequently, on the merits of the case, it had claimed that Article 17 debarred the applicant from relying on the Convention at all; that

¹ This last argument had not been used before the Commission. It was one of the additional observations made by the applicant to the Commission, after receiving its report, and was submitted by the Commission to the Court.

Article 5 permitted detention without trial for the purpose of preventing the commission of an offence; and that, once a Government's good faith is established, both the Commission and the Court must accept its appreciation of the existence of an emergency and of the measures necessary to deal with it. On all these points, the Court decided against the Irish Government. Yet on the crucial points of the existence of an emergency threatening the life of the nation and whether the measures taken were strictly required by the exigencies of the situation—points which, at least in the written pleadings, were not developed at all in the statement of its case—the Government's point of view prevailed and its action was upheld by the Court.

As stated in the earlier note on this case published in the *Year Book* for 1960, one of its most important aspects is the precedent it will set for the future or on relations between the Court, the Commission and the applicant. While respecting the provisions of the Convention to the effect that the applicant cannot be a party to its proceedings, the Court has nevertheless approved a procedure which permits his views to be made known to it, thus respecting the principle of *audi alterem partem*. This is an important innovation. Furthermore, the Court has upheld its own right, and that of the Commission 'to examine and pronounce on a Government's determination of the existence of a public emergency threatening the life of the nation' and of the appropriateness of the measures taken; moreover, on the last point, the Court not only examined, in general terms, whether the measures taken were strictly necessary but also how they were applied in the particular case. In so doing, it has laid down important rules for the future which will undoubtedly reinforce the value of the Convention as an international guarantee for the protection of human rights and as a safeguard against the danger of authoritarian government.

In conclusion, when recounting this first case that has been through all the various stages of consideration by the two organs set up by the European Convention on Human Rights, one cannot help but notice the ponderous nature and protracted character of the proceedings. The application was filed on 8 November 1957. Written and oral pleadings were then submitted before the application was declared admissible on 30 August 1958. A Subcommission was then appointed, as required by the Convention, to ascertain the facts. It received and considered further written and oral pleadings and held no fewer than six sessions and meetings. On 20 April 1959 it proffered its good offices with a view to reaching a friendly settlement, but this having proved impossible, it remitted the matter to the full Commission. The latter drew up and, on 19 December 1959 adopted a report which was transmitted to the Committee of Ministers on 1 February 1960. Then, on 12 April 1960, the Commission referred the matter to the Court. After a further exchange of pleadings, hearings took place on the preliminary objections in October 1960 and Judgment was given in November. More pleadings were exchanged before the hearings on the merits took place in the following April, after which Judgment was pronounced on 1 July 1961, three years and eight months after the application was filed.

To put the matter in perspective it must, of course, be remembered that in the case of municipal courts recourse to the highest tribunal inevitably takes a long time and that proceedings before an international court can hardly be more rapid; moreover, in the *Lawless* case, the fact that the Irish Government raised preliminary objections on procedure added substantially to its duration. Nevertheless, it should not be impossible to find a way of accelerating the proceedings before the Commission and the Court. In fact, the Committee of Ministers of the Council of Europe recently appointed a committee of governmental experts to consider various proposals for concluding

a Second Protocol to the Convention on Human Rights and to study other matters relating to the Convention. It is to be hoped that this committee will agree on, and that the Governments will accept, measures which will not only give additional guarantees to the individual citizen but also improve and accelerate the procedure for the protection of his rights.

DECISIONS OF BRITISH COURTS DURING 1960-1 INVOLVING QUESTIONS OF PUBLIC OR PRIVATE INTERNATIONAL LAW

A. PUBLIC INTERNATIONAL LAW*

Statute in conflict with pre-existing treaty

Case No. 1. Inland Revenue Commissioners v. Collico Dealings Ltd., [1961] 2 W.L.R. 401; 1 All E.R. 762, H.L. This case was fully reported in the previous issue of this *Year Book*.¹ It is now only necessary to report that the decision of the Court of Appeal has been affirmed by the House of Lords, unanimously, and that their Lordships were equally unanimous on the proposition that a statute which is not ambiguous must be applied irrespective of any treaty to the contrary. In the words of Viscount Simonds:

'It is said that the plain words of the statute are to be disregarded . . . in order to observe the comity of nations and the established rules of international law. I am not sure upon which of these high-sounding phrases the appellant company chiefly relies. But I would answer that neither comity nor rules of international law can be invoked to prevent a sovereign state from taking what steps it thinks fit to protect its own revenue laws from gross abuse, or to save its own citizens from unjust discrimination in favour of foreigners. To demand that the plain words of the statute should be disregarded in order to do that very thing is an extravagance to which this House will not, I hope, give ear.'²

This is perhaps going rather beyond the accepted proposition that the courts must strictly apply an unambiguous statute, whatever the consequences in international law so far as the responsibility of the United Kingdom under that law is concerned; and this is all that was really needed to reach the decision their Lordships arrived at. Viscount Simonds seems to suggest that the State can never be regarded as having restricted, by treaty, its freedom to protect its revenue laws from gross abuse. This suggestion must, of course, be rejected. The short answer to it is that it is for the United Kingdom's plenipotentiaries, in agreeing on the terms of the treaty, to see to it that the revenue laws are protected from gross abuse. Such an abuse cannot thereafter be invoked as a ground for departing from treaty obligations accepted as binding.

A construction of the 1926 agreement with the Republic of Ireland of an extremely dubious nature was made by Lord Reid when he said:

'But I do not think that there is necessarily a presumption that every infringement of a treaty is a breach of the comity of nations. After a treaty has been made circumstances may alter and it may be reasonable to take unilateral action in the expectation that the other party to the treaty will not object.'³

It is difficult to imagine an English judge making a similar observation about a contract in English law, even though the doctrine of frustration is far more soundly established in that law than the doctrine of *clausula rebus sic stantibus* in international law; some comfort may be derived from the knowledge that the extremes of both the statements quoted are *obiter dicta*.

* © Dr. D. W. Bowett, 1962. All page references to citations from judgments are, except where otherwise stated, to the judgments as reported in the report first given after the name of each case.

¹ This *Year Book*, 36 (1960), at p. 399.

² p. 410.

³ p. 413.

Diplomatic immunity—waiver—extension to criminal proceedings

Case No. 2. R. v. Madan (1961), 45 Cr. App. R. 80; 2 Q.B. 1; 2 W.L.R. 231. This was an appeal against conviction, heard by the Court of Criminal Appeal. The appellant had been convicted at the London Sessions of obtaining a season ticket from the London Transport Executive and of attempting to obtain money by false pretences, and was sentenced to four months' imprisonment.

The appellant, a native of India, was on the staff of the High Commissioner for India and his name was on the list kept by the Secretary of State under section 1 (4) of the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952. It appears that, although at the trial the fact that the appellant was on the staff of the High Commissioner was known, and although a probation officer informed the Deputy-Chairman of the Sessions that the High Commissioner's Office was under the impression that the appellant was entitled to diplomatic immunity, the Deputy-Chairman took the view that the appellant must at some time have waived any immunity and was, in any event, too late to claim it after the Court had adjourned. Three months after the proceedings, on 21 November 1960, the Deputy High Commissioner had written to the Commonwealth Relations Office saying that the appellant was entitled to immunity but adding that the High Commissioner was prepared to waive the immunity on the understanding that this was not to be treated as a precedent.

The appellant therefore contended that, although his solicitor may have waived the immunity at the committal proceedings, such waiver could only be by the High Commissioner, and not by the appellant or his solicitor; therefore all proceedings before the actual waiver by the High Commissioner on 21 November 1960 were without jurisdiction and a nullity.

The Lord Chief Justice gave the Judgment of the Court and formulated a series of propositions.

'In the first place, it is not for someone who is entitled to diplomatic immunity to claim it in the courts . . . we think it is clear that proceedings brought against somebody, certainly civil proceedings brought against somebody, entitled to diplomatic immunity are in fact proceedings without jurisdiction and null and void unless and until there is a valid waiver. . . . Moreover, it is clear that that waiver must be a waiver by a person with full knowledge of his rights and a waiver by or on behalf of the chief representative of the State in question.'¹

The authorities expressly relied upon for this proposition were section 1 (5) of the 1952 Act,² *R. v. Kent*,³ *Engelke v. Musmann*,⁴ *Dickinson v. Del Solar*⁵ and *Marshall v. Critico*.⁶

The Lord Chief Justice then turned to the difficulty that all these authorities related to civil proceedings, and that, in *Kent* for example, the question of whether immunity existed in relation to a criminal charge had been left open.⁷ Nor did *Halsbury's Laws* reveal any express authority on the point. The Lord Chief Justice therefore concluded:

'When one is dealing with something, as in this case, which is *malum prohibitum*, this court takes the view that in a case such as this there is no distinction to be drawn between the principles of law applicable in the case of civil proceedings and criminal charges.'⁸

¹ p. 85.

² 'Notwithstanding anything in the preceding provisions of this section (a) a chief representative may waive any immunity conferred by or under this section on himself or on a member of his staff, or on a member of his family or of the family of a member of his staff'

³ (1941), 28 Cr. App. R. 23; *sub nom.* A.B., [1941] 1 K.B. 454.

⁴ [1928] A.C. 433.

⁵ [1930] 1 K.B. 376.

⁶ (1808) 9 East, 447.

⁷ *Per* Lord Caldecote, at p. 26.

⁸ p. 87.

On this finding the sole remaining question was whether the waiver on 21 November 1960 operated retrospectively. As to this the Lord Chief Justice stated:

'It is enough for our decision in the present case to say that on its face it does not purport to do so.'¹

The Court accordingly quashed both convictions.

In commenting on this case it can be said that the only new point decided by it is that of the application of immunity to criminal proceedings. The absence of direct authority is surprising, and it is clear from the case that the Attorney-General, advising the Court as *amicus curiae*, had considered all the authorities referred to in *Halsbury's Laws*.² What must be regretted is that the Court of Criminal Appeal has seen fit to perpetuate the distinction between *malum in se* and *malum quia prohibitum* in this connexion.³ The former crime is generally considered to be an act wrong in itself, whether prohibited by human laws or not, the latter a wrong only by virtue of specific statutory prohibition. Does the Court now suggest that murder, robbery, perjury, riot, injury to persons or property (all common examples of *mala in se*) do not admit of immunity? Quite what a foreigner will make of this archaic distinction it is difficult to say.

It may be noted that in *Palachie's* case⁴ the opinion of the civilians was that an ambassador might be prosecuted for an offence against the 'law of nature or reason'. In the case in 1654 concerning Don Panteleo de Sà e Meneses⁵ the opinion of the judges was that there was no immunity against prosecution for murder, since murder is an offence against the law of nations and 'having offended against the law of nations they cannot pray the aid of those laws'. It is difficult to imagine the Court of Criminal Appeal resting itself on either of these arguments in this day and age. Moreover, in the later incident in 1771 arising from the arrest of servants of the French Ambassador after a brawl in London, the opinion of the Law Officer,⁶ Thurlow, was limited to justifying the temporary arrest; there is no mention of any attempt to prosecute.

It appears, therefore, that the examination of the English precedents by the Attorney-General and the Court was a somewhat cursory one. No mention is made of the resort to expulsion rather than prosecution in the incidents relating to Count Gyllenborg in 1716, and Prince de Cellamare in 1718, both referred to in the standard work by Satow.⁷ Indeed, the practice of expulsion may well explain the dearth of decided cases.

In any event, if the English authority is inconclusive why, instead of resorting to archaisms, did the Court (or possibly the Attorney-General) not feel it worth while to examine what the generally accepted principle is in international law? Her Majesty's Government has only recently participated in a United Nations Conference on Diplomatic Intercourse, held in Vienna in 1961, and Her representatives signed a convention which purported, in large part, to be declaratory of existing international law. Article 31 (1) of that Convention⁸ provides:

'A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. . . .'

By the 'definitions article', Article 1, a 'diplomatic agent' is defined as the 'head of the mission or a member of the diplomatic staff of the mission'. How welcome it would

¹ pp. 87-88.

² (3rd ed.), vol. 7, p. 269.

³ For this distinction see Blackstone, *Commentaries*, vol. 4, iv, pp. 8-9; and see its application in cases on the dispensing power such as *Thomas v. Sorrell* (1674), 124 E.R. 1098 and *Godden v. Hales* (1686), 11 St. Tr. 1165.

⁴ (1615), 1 Rolle, 175.

⁵ See McNair, *International Law Opinions*, vol. 1, pp. 188-9.

⁶ *Ibid.*, p. 191.

⁷ *A Guide to Diplomatic Practice* (3rd ed.), p. 168.

⁸ For a convenient text see *International and Comparative Law Quarterly*, 10 (1961), p. 600.

have been to have seen an English court, or an English Attorney-General, taking the view that here was a case on which the court was not restricted by statute or precedent and on which, therefore, it should be guided by the best possible evidence of what international law was.

Immunity of State-owned commercial vessels

Case No. 3. Republic of Cuba v. Flota Maritima Browning de Cuba, S.A.; Flota Maritima Browning de Cuba, S.A. v. The 'Canadian Conqueror' and other Vessels, [1961] 2 Lloyd's List Reports, 230; Exchequer Court of Canada. In August 1960 the respondent to this appeal, a Cuban corporation (hereafter referred to as Flota) had instituted proceedings *in rem* in the Nova Scotia Admiralty District against the seven vessels named as defendants, claiming one and a half million dollars damages for breach of a Lease-Purchase Agreement, for the use and hire of the vessels with an option to purchase, dated 19 August 1958. This Agreement contained an express submission of all questions relating to the Agreement to the Cuban courts and the parties renounced their right to resort to any other jurisdiction by reason of nationality or of domicile or for any other cause; the parties to the Agreement were Flota and the Cuban Bank of Foreign Commerce. At the same time as Flota instituted these proceedings it secured a warrant for the arrest of the seven vessels then lying in the Port of Halifax, Nova Scotia.

Counsel for the Cuban Republic entered an appearance for Cuba contesting the jurisdiction of the Admiralty Court on the grounds of (1) the sovereign possession of the Cuban Republic, which should not be impleaded, and (2) the estoppel operating against Flota under the express terms of the Agreement preventing recourse to any courts other than the Cuban courts.

The Deputy Judge in Admiralty, Mr. Justice Pottier, dismissed this application to set aside the writ¹ on three grounds:

- (1) that the plea of sovereign immunity was good only when 'ships are involved in matters *jure imperii*', or governmental functions, and did not apply when they were employed on matters *jure gestionis*, or non-governmental functions;
- (2) that the Admiralty jurisdiction embraced all maritime contracts touching rights and duties appertaining to commerce and navigation;
- (3) that this jurisdiction could not be ousted by agreement between the parties to a contract otherwise within the jurisdiction.²

The Cuban Government appealed against this decision and the appeal then came before Mr. Justice Cameron in the Exchequer Court.

Mr. Justice Cameron first dealt with the question of sovereign immunity. Accepting that the Republic of Cuba was a sovereign State, so recognized by Canada, he held that Cuba was impleaded in these proceedings, even though not named as a defendant.³ He

¹ [1961] 2 Lloyd's List Reports, 46.

² For the English view on this matter see *The Fahmarn*, [1957] 1 W.L.R. 817 where it was said by Willmer J.: '... it is well established that, where there is a provision in a contract providing that disputes are to be referred to a foreign tribunal, then, *prima facie*, this court will stay proceedings instituted in this country in breach of such agreement, and will only allow them to proceed when satisfied that it is just and proper to do so.' The availability of most of the evidence in England rather than the Soviet Union made it 'just and proper' to hear the case in England and not in the contractually agreed forum, the Soviet Union. It may be noted that this is 'choice of jurisdiction' and not 'choice of law'.

³ The writ was directed to 'the owners and all others interested in the defendant vessels'.

adopted Lord Atkin's test in *The Christina*,¹ where it was said that a person is 'im-pleaded' if he claims an interest in the property adverse to that claimed by the plaintiffs, coupling with it the requirement that the interest must not be merely illusory, or based upon a manifestly defective title.² On the evidence his Lordship held that the Cuban Government had a title which was not illusory, since the Cuban Bank of Foreign Commerce had conveyed all its rights in the vessels to the Cuban Government on 9 June 1959.

Proceeding from the finding of fact that the vessels were the property of the Cuban Government and were in its possession and control (as evidenced by the payment by that government of the upkeep of the vessels in Halifax harbour), his Lordship then turned to the substantial point of law, namely that involved in the argument that the non-governmental function of the vessels meant that sovereign immunity could not be pleaded in respect of them. After examining the English decisions of *The Christina*,³ *The Porto Alexandre*,⁴ *The Parlement Belge*,⁵ with extensive quotations from the judgments in these cases, and works on international law such as Marsden's *Collisions at Sea*,⁶ Oppenheim's *International Law*,⁷ Cheshire's *Private International Law*⁸ and the text of the 1926 Brussels Convention, he held that:

'in the instant case, the respondents' claim does not arise from the operation of the defendant vessels, but rather from a contract respecting the operation of the vessels. The fact is that while the vessels were originally equipped and used for the carriage of freight and passengers, they had been put to no commercial purposes since about 1956 or 1957 and have never been used for commercial or any other purposes by either Banco or Cuba. . . . Moreover, there is no evidence that the Republic of Cuba intended to use them for commercial purposes. . . . Accordingly, the appeal will be allowed, the writ and warrants of arrest in this action and service thereof will be set aside as the Court is without jurisdiction to entertain the action.'⁹

In commenting on this case it may be stated that the strict *ratio decidendi* is that where a commercial vessel is owned and controlled by a State and a claim against the vessel is made *which does not relate to the operation of the vessel for commercial purposes*, the plea of sovereign immunity may be made and any action *in rem* or arrest of the vessel will be set aside for want of jurisdiction. His Lordship did not, therefore, decide the question of the immunity of State-owned vessels actually operated for commercial purposes. He did, however, note the remarks of Lord Wright in *The Christina* case¹⁰ to the effect that the 1926 Brussels Convention (not binding on the United Kingdom in any event) discarded absolute immunity only in respect of claims in respect of the operation of the vessels, such as claims *in rem* for collision damage, as in *The Parlement Belge*, or for salvage, as in *The Porto Alexandre*, or for cargo damage, as in *The Pesaro*.¹¹ Certainly Article 1 of that Convention supports this view, for it provides:

'Seagoing vessels owned or operated by States, cargoes owned by them, and cargoes and passengers carried on Government vessels, and the States owning or operating such vessels, or owning such cargoes, are subject in respect of claims relating to the operation

¹ [1938] A.C. 485 at p. 492.

² Relying on the statement of Earl Jowitt in the Judicial Committee of the Privy Council in *Juan Ysmal & Co., Inc. v. Indonesian Government*, [1955] A.C. 72.

³ [1938] A.C. 485.

⁴ [1920] P. 30.

⁵ (1880), 5 P.D. 197.

⁶ (10th ed., 1953), p. 236.

⁷ (8th ed., 1955), p. 856.

⁸ (5th ed., 1957), p. 90.

⁹ p. 241.

¹⁰ At p. 512.

¹¹ 271 U.S. 562. This decision received adverse comment in *The Baja California*, decided by the U.S. Supreme Court in 1945 (see n. 4, below, p. 553).

of such vessels or the carriage of such cargoes, to the same rules of liability and to the same obligations as those applicable to private vessels, cargoes and equipments.'¹

Article 20 of the Convention on the Territorial Sea and Contiguous Zone, concluded at Geneva in 1958 but not yet in force, similarly subjects Government-owned merchant vessels to civil liability to arrest or execution 'only in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal State'.² These would all be, necessarily, claims relating to the operation of the vessel for commercial purposes, so to that extent Mr. Justice Cameron's test is in harmony with both these conventions. However, the later convention is concerned only with subjection to the jurisdiction of the coastal State of a foreign vessel in innocent passage through its territorial waters. It may well be argued that a much more comprehensive jurisdiction exists where the vessel is not in passage but, as in the present case, virtually stationed in the State's internal waters.

The 'innuendo' of the Judgment is that a different view might well be taken were the vessel used for commercial purposes and were the action to relate to such use. This would, of course, represent a departure from the English decisions as they now stand, but would be consistent with the decisions of national courts in Italy, France and Belgium.³ However, perhaps one ought not to read too much into this 'innuendo'. Returning to the strict *ratio*, it is proper to caution against deducing from the Judgment the proposition that in all cases, where the claim does not relate to the operation of the vessel for commercial purposes, immunity will be upheld. This was a case where the State was both the owner and in possession of the vessels. A different situation might well arise where the vessel is State-owned but the State is not in possession,⁴ although there is no English decision on these facts. Even more might the decision be different where the vessel is privately owned but in the possession of the State, as in the case of a charter or requisitioning by the State. It may be recalled that in *The Crimdon*,⁵ on these facts, a distinction was drawn, *obiter*, between an action *in rem*, and a writ for the arrest of the vessel, on the basis that the former questions the title of the private owner and can therefore be heard without 'impleading' the sovereign State, whereas the latter should be rejected since it interferes with the sovereign's use of the vessel.⁶ Hence, rather than assume immunity exists, one is still advised to put the proposition in the form that *if* immunity exists, this may be lost by the fact that the

¹ Hudson, *International Legislation*, vol. 3, p. 1840.

² Convenient text in the *International and Comparative Law Quarterly*, 7 (1958), Special Suppl., p. 4.

³ See Walton, 'State Immunity in the Laws of England, France, Italy and Belgium', *Journal of Comparative Law*, 3rd series, 2 (1920), pp. 252-8.

⁴ As in '*The Baja California*', *American Journal of International Law*, 39 (1945), p. 585, where the U.S. Supreme Court, following a consistent line of decisions of federal courts, refused to accord immunity where the Mexican Government was not in possession. The vessel was, admittedly, engaged in commerce by the private hirers, but this does not appear to have been the primary reason for declining immunity, but rather the lack of possession and the fact that the State Department was not prepared to certify that immunity attached. There is no comparable English decision; *The Porto Alexandre*, [1920] P. 30 must be treated as if possession lay in the State, through the State agency which operated it on behalf of the government.

⁵ (1918), 35 T.L.R. 81; and see also *The Messicano* (1916), 32 T.L.R. 519.

⁶ The validity of the distinction is at least arguable. In *The Dictator*, [1892] P. 304 it is suggested that from the nineteenth century onwards arrest became the distinctive feature of the action *in rem*, having as its primary object the satisfaction of the creditor out of the object seized. But see the suggestion by McNair that this may simply involve the suspension of any enforcement of a judgment *in rem* until the sovereign's possession ceases, in 'Recognition of States and Governments', this *Year Book*, 2 (1921-2), p. 74.

vessel is engaged in commerce and that the action arises from actual commercial operation; but this is going beyond what Mr. Justice Cameron strictly decided. It may be added, by way of conclusion, that the painstaking examination of authorities in the Judgment of Mr. Justice Cameron makes a contrast with the Judgment of the Court of Criminal Appeal in the case noted above, *R. v. Madan*, which is not to the advantage of the latter.

Criminal jurisdiction over acts committed on board a British aircraft over the high seas

Case No. 4. R. v. Naylor (1961), 45 Cr. App. R. 69; 3 W.L.R. 898. This case arose on a motion to quash the indictment of Naylor before the Central Criminal Court on a charge of larceny contrary to section 2 of the Larceny Act, 1916; the particulars of the offence alleged that the defendant 'on the 30th day of June, 1960, on a British aircraft in flight over the high seas, stole three rings'. Defending counsel moved to quash the indictment on the ground that there was no jurisdiction to try the defendant in England for the offence charged.

Section 62 (1) of the Civil Aviation Act, 1949 provides:

'... any offence whatever committed on a British aircraft shall, for the purpose of conferring jurisdiction, be deemed to have been committed in any place where the offender may for the time being be.'

Lord Chief Justice Parker commented that this was 'on any view, rather unfortunate language'.¹ He noted that, in essence, the two rival contentions were that the section meant that any act or omission which constituted an offence if committed in England constitutes an offence if committed on a British aircraft, as is the case with British ships; or, as the defence contended, the section dealt solely with jurisdiction and venue, so that one must ascertain independently of the section whether the act constitutes an offence under English law.

His Lordship noted that in the standard English work on the law of the air² the former contention, that of the prosecution, was adopted. However, in an earlier decision by Devlin J., in *R. v. Martin*,³ an indictment alleging an infringement of regulation 3 of the Dangerous Drug Regulations, 1953, had been quashed. In that case the offence arose from the taking of opium from Bahrein to Singapore by members of the crew of a British aircraft, and Devlin J. held that the Dangerous Drug Regulations had no extra-territorial effect or operation. This conclusion was arrived at as a matter of construction of the Regulations, and it followed that, unless the acts were an offence if committed abroad, section 62 (1) of the Civil Aviation Act of 1949 could not make them so merely by reason of the acts taking place on a British aircraft; there must first be an 'offence'.

In the present case Parker L.C.J. treated Devlin J.'s decision as limited to 'purely domestic legislation' and took up the distinction previously made by Devlin J. between such statutory offences and 'crimes conceived by the common law, which are mostly offences against the moral law, such as murder and theft', such crimes not having territorial limits. He concluded:

'In my judgment, the approach to this matter is that any act or omission which would constitute an offence if done in England is made an offence if done on a British aircraft, subject to this, that if the offence in question is clearly one of domestic application only then, as in *R. v. Martin*, section 62 does not cover that sort of offence.'⁴

¹ p. 70.

³ (1956), 40 Cr. App. R. 68.

² McNair's *Law of the Air* (2nd ed.), p. 118.

⁴ pp. 71-72.

In commenting on this case it may be said that the test of 'domestic application' will not always be easy to apply; is it a test purely of construction of the words used in the statute, or has it something to do with the purpose of the statute? Even apart from this, it is clear that Parker L.C.J. is putting a much wider construction on section 62 (1) than did Devlin J. The latter conceded no operation to that section unless, apart from it, the act was already an offence if committed outside the United Kingdom. Parker L.C.J. is prepared to apply the section to any act which would be an offence if committed in England, subject to the exception of those laws of purely domestic application.

On balance this broader construction seems the better one. It virtually adopts the analogy of a vessel on the high seas and applies the 'law of the flag'. It would seem, therefore, that the nationality of the accused is irrelevant. In the case of a crime committed in an aircraft over the high seas this solution is a convenient one and it is uncomplicated by the rival contention for jurisdiction of the territorial State which may arise where the crime is committed in an aircraft above such State's territory. It is the solution adopted by several other States, for example Belgium,¹ Italy² and the United States³ and was the basic assumption made as long ago as 1910 when Von Bar submitted his proposals to the Institute of International Law.⁴ It is not, however, the only possible solution. For example, the French rule is as follows:

'Les rapports juridiques entre les personnes qui se trouvent à bord d'un aéronef étranger en circulation sont régis par la loi du pavillon de cet aéronef, toutes les fois que la loi territoriale serait normalement compétente. Toutefois, au cas de crime ou délit commis à bord d'un aéronef étranger les tribunaux français sont compétents si l'auteur ou la victime est de nationalité française ou si l'appareil atterrit en France après le crime ou délit.'⁵

Hence the 'law of the flag' is qualified to a considerable extent and the possibility of competing jurisdictions arises, even in respect of a crime committed over the high seas. Certainly the English rule adopted in the present case has the virtue of simplicity. Its defects become apparent only when one envisages the situation of a crime committed on board a British aircraft flying over another State's territory, or of a foreign aircraft being over British territory, for we are then forced to concede, on principle, the validity of at least one other claim to jurisdiction concurrently with our own.

Jurisdiction in respect of civil offences over members of British Forces in Germany

Case No. 5. R. v. Cox, The Times, 28 November 1961. This was an appeal to the Courts-Martial Appeal Court⁶ by a serving member of the British Army of the Rhine

¹ Law of June 1937 amending the Law of 16 November 1919, cited in Honig, *The Legal Status of Aircraft* (1956), pp. 168-9.

² *Codice della Navigazione* of 30 March 1942, Article 4, *ibid.*, p. 173.

³ *U.S. Code (Crimes and Criminal Procedure)*, Title 18, s. 7. This was adopted after the decision in *U.S. v. Cordova*, U.S. Aviation Reports, 1950, R. 1 which held the criminal law of the United States inapplicable to crimes committed aboard U.S. aircraft above the high seas.

⁴ *Annuaire de l'Institut de Droit International* (1910), p. 318. It can, however, be argued that Von Bar's maxim 'les aérostats sont réputés faire partie du territoire de l'Etat' is essentially different from the 'nationality' principle which vests jurisdiction in the State of the nationality of the aircraft; see Honig, *op. cit.*, p. 139. But the result is the same.

⁵ Article 10, 'Loi relative à la navigation aérienne du 31 mai 1924'. It is arguable whether this means the first landing of the aircraft after the crime or, additionally, any subsequent landing when the offender is still on board the aircraft and at liberty.

⁶ It was formerly the case that no right of appeal to any court existed against the decision of a court-martial. The law has, however, been changed by the Courts-Martial (Appeals) Act, 1951, and the Courts-Martial Appeal Court consists of not less than three judges drawn from the Lord

against his conviction on 6 January 1961 by a District Courts-Martial held in Germany. He had been charged with committing a civil offence contrary to section 70 of the Army Act, 1955,¹ namely driving a motor vehicle without due care and attention contrary to section 3 (1) of the Road Traffic Act, 1960.

The appellant contended that the words in section 70 'if committed in England' could not apply to an act such as driving on a German road which was incapable of being committed in England. Moreover, it was an essential ingredient of any offence under section 3 (1) that the vehicle should be driven on a road, and a 'road' was defined by section 257 of the 1960 Act as being a road to which the public had access; this presumably meant the English public.

Mr. Justice Slade, giving the judgment of the Court, noted that subsection 2 of section 70 had two limbs, the second of which (unless it be regarded as mere surplusage) necessarily created a new offence in that it made punishable an act committed abroad and not hitherto punishable by English law but which would have been punishable if committed in England. This new offence necessarily involved the notional transfer to England of all the circumstances surrounding the act. No doubt certain offences were by their very nature incapable of being committed in England, and *vice versa*, but driving a motor car without due care and attention on a road to which members of the public had access was not one of them. Any other construction would seem to deprive section 70 of the effect which Parliament must have intended it to have.

In commenting on this case it is sufficient, so far as English law is concerned, to state that the judgment seems the only reasonable one which could have been given as a matter of construction of section 70. However, leave to appeal to the House of Lords has been granted, on the ground that the case involved a matter of general public importance,² so that more may yet be heard of it and a fuller report, even of the present judgment, may yet appear in the Law Reports; the report in *The Times* is the only available report at the time of writing.

So far as international law is concerned, the case is a reminder that the Federal Republic of Germany is not yet a party to the N.A.T.O. Status of Forces Agreement of 1951.³ Had it been so Article VII of the Agreement would undoubtedly have given the primary right to exercise jurisdiction to Western Germany (assuming the driving offence did not arise out of 'any act or omission done in the performance of official duty'). The status of British forces in Germany is at present governed by the Convention on the Rights and Obligations of Foreign Forces and their Members in the Federal Republic of Germany, commonly referred to as the 'Forces Convention', signed at Bonn on 26 May 1952.⁴ Under the Forces Convention the basic rule is that the sending Chief Justice and the puisne judges of the High Court and other judges from Scotland and N. Ireland (s. 1).

¹ Section 70 reads: '(1) Any person subject to military law who commits a civil offence whether in the United Kingdom or elsewhere shall be guilty of an offence against this section. (2) In this Act the expression "civil offence" means any act or omission punishable by the law of England or, which if committed in England, would be punishable by that law.' The practice prior to the Army Act, 1955, which entered into force only in 1957, can be seen in *R. v. Jennings*, [1956] 1 W.L.R. 1497, where a Courts-Martial Appeal Court upheld a conviction under section 41 (5) of the Army Act, 1881, for driving without due care and attention contrary to s. 12 of the 1930 Act.

² Administration of Justice Act, 1960, s. 1 (2).

³ Signed at London, 19 June 1951, entered into force 23 August 1953; *American Journal of International Law*, 48 (1954), Suppl., p. 83; *United Kingdom Treaty Series*, No. 3 (1955), Cmd. 9363.

⁴ Germany, No. 6 (1952), Cmd. 8571. The original Convention was amended by Schedule II to the Protocol on the Termination of the Occupation Régime in the Federal Republic of Germany, signed at Paris on 23 October 1954.

States have exclusive criminal jurisdiction over members of their forces and their dependants, hence this necessity for jurisdiction over driving offences. This Convention was intended to be of short duration, remaining in effect only until new arrangements could be made which would cover not only the forces of France, U.K. and U.S.A., but also of other N.A.T.O. members; the new arrangement would be based upon the N.A.T.O. Status of Forces Agreement.¹

In fact new arrangements have been made in the 'Agreements regarding Foreign Forces stationed in the Federal Republic of Germany supplementary to the Agreement on Status of Forces of Parties to the North Atlantic Treaty', signed at Bonn on 3 August 1959² but not yet ratified by the United Kingdom. These Agreements contemplate the accession of Germany to the N.A.T.O. Status of Forces Agreement, and one would have expected to have seen Germany placed on equal footing with other N.A.T.O. host countries so far as jurisdiction was concerned. That is not the case. Whereas, under the N.A.T.O. Agreement, the receiving State has the primary right to exercise criminal jurisdiction except in (1) offences solely against the property or security of the sending State or against the person or property of another member of the force or civilian component of that State or of a dependant, and (2) offences arising out of any act or omission done in the performance of official duty, Article 19 of the new Agreement provides that any sending State may, at the time of the entry into force of the Agreement, request Germany to waive the primary right to criminal jurisdiction in favour of the sending State. The only exception is a case where 'major interests of German administration of justice make imperative the exercise of German jurisdiction'.³ In the Agreed Minutes this phrase is defined to include only the most serious offences, within the competence of the Federal High Court of Justice or offences to be prosecuted by the Chief Federal Prosecutor, or offences causing the death of a human being, robbery, and rape; even then this does not apply where the victim is a member of the force or of a civilian component or a dependant. Hence, even when the new Agreements enter into force driving offences will still not fall within the jurisdiction of the German courts if the sending State requests the waiver under Article 19; so *R. v. Cox* may be of more lasting importance than one might have at first supposed.

D. W. BOWETT

B. PRIVATE INTERNATIONAL LAW*

Recognition of foreign nullity decrees.

Case No. 1. In general terms it can be said that the decision of Lloyd-Jones J. in *Abate v. Abate (or se Cauvin)*⁴ extends the principle of *Armitage v. Attorney-General*⁵ to nullity cases. The *Armitage* case itself concerned the recognition of a foreign divorce: the wife had obtained a decree in the State of South Dakota at a time when her husband and thus herself were domiciled in the State of New York. Sir Gorell Barnes P. recognized this decree because although it was not granted by a New York court there was evidence which he accepted that it would be recognized in the New York courts. The learned President said:

¹ See the Convention on Relations between the three Powers and the Federal Republic of Germany, Article 8 (1) (b), also signed at Bonn on 26 May 1952, loc. cit., Cmd. 8571.

² *Parliamentary Papers, Miscellaneous No. 12* (1959), Cmd. 852.

³ *Ibid.*, Article 19.

* © P. B. Carter, 1962.

⁴ [1961] P. 29.

⁵ [1906] P. 135.

'The point then is: Are we in this country to recognize the validity of a divorce which is recognized as valid by the law of the domicile? In my view, this question must be answered in the affirmative. It seems to me impossible to come to any other conclusion, because the status is affected and determined by the decree that is recognised in the State of New York—the State of the domicile—as having affected and determined it.'¹

In *Abate v. Abate (or se Cauvin)* the husband had obtained a decree of nullity in the Swiss Canton of the Grisons at a time when he was domiciled in Italy. Less than three months after obtaining this Swiss decree, he (being then resident in England) sought a declaration in England that the Swiss decree was a valid and effective decree annulling the marriage. Expert evidence established that the courts of Italy would recognize the decree. Lloyd-Jones J., declaring the decree valid, said:

'The first question to be decided is whether the principle established in *Armitage v. Attorney-General* should be applied to nullity suits. There appears to be no reported authority on the matter, but textbooks appear to warrant its application: see Dicey's *Conflict of Laws*, 7th ed., p. 383; Rayden *On Divorce*, 8th ed., p. 824; Jackson on *The Formation and Annulment of Marriage*, p. 281. In my judgment, if the court of the domicile of the parties recognises a nullity decree, this court will recognise it, and I so hold.'²

This development of the scope of the *Armitage* doctrine warrants a reappraisal of its basis. The consideration which dominates Sir Gorell Barnes's judgment is respect for the principle of domicile in matters of status. His abdication to that principle is far-reaching: the sole question is as to whether the decree would be recognized in the courts of the domicile at the time at which it was pronounced. The inadequacy by English private international law standards of the basis upon which the South Dakota court assumed jurisdiction was immaterial. Moreover, that the grounds upon which the decree was pronounced might not be grounds for divorce in England was immaterial. But if (which was not the case) the courts of New York would have refused to recognize the South Dakota decree because it was pronounced on grounds inadequate by New York law, Gorell Barnes P. would, presumably, have accordingly declined to recognize the decree. Again, the reasons for recognition or otherwise by the courts of the domicile are not a proper subject of investigation by the English court. In a word, respect for the principle of the domicile led in *Armitage v. Attorney-General* to the acceptance of the doctrine of *renvoi* in an extreme form.

In assessing the extension of the *Armitage* doctrine to nullity cases it is to be remembered that if the marriage is, by English private international law rules, void as distinct from merely voidable, the question of recognizing a foreign nullity decree will seldom arise, and when it does arise it would be somewhat incongruous to withhold recognition. But a marriage which is merely voidable is one which by definition requires a decree to annul it. The problem is as to when a foreign decree will suffice for this purpose in the eyes of an English court. The principle of domicile does not predominate here in the way in which it predominates in the sphere of divorce. It is not clear beyond doubt that the rule in *Salvesen v. The Administrator of Austrian Property*,³ providing for the recogni-

¹ [1906] P. 135, 141.

² [1961] P. 29, 32. This finding by the learned judge made it unnecessary for him to decide upon the merits of an alternative ground put forward for recognition, namely that both parties were resident in the Canton of the Grisons at the time of the decree. An English court will assume jurisdiction in nullity on the basis of common residence; *Ramsay-Fairfax v. Ramsay-Fairfax*, [1956] P. 115. The doctrine of *Travers v. Holley*, [1953] P. 246 apparently opens up the possibility of recognition of foreign decrees in which jurisdiction was based on this ground.

³ [1927] A.C. 641.

tion of foreign nullity decrees pronounced by the courts of the domicile, applies in all cases. Conversely, there is considerable authority¹ for the view that a decree pronounced in the *forum celebrationis* will be recognized even though the parties were domiciled elsewhere.² Moreover, it is to be remembered that English courts have themselves long assumed jurisdiction in nullity proceedings on grounds other than the domicile of the parties.

Corroborative evidence that domicile has loomed much less large in the private international law of nullity than it has in the private international law of divorce is provided by the choice of law position in the English courts. At common law when divorce jurisdiction was assumed only on the basis of domicile at the time of the petition, what was in fact the law of the domicile (English domestic law) was always applied.³ In nullity cases, however, independent choice of law rules, pointing variously to the law of the place of celebration, the law of a party's antenuptial domicile and the law of the intended matrimonial home, have emerged.

Given the limitations upon the scope of the principle of domicile in the private international law of nullity it would not have been remarkable had Lloyd-Jones J. declined in *Abate v. Abate (orse Cauvin)* to extend the *Armitage* doctrine to such proceedings. That he has nevertheless done so may perhaps have diverse and not entirely consistent consequences.

It may lend support to the view that domicile should play a more significant part in the law of nullity. The case for this on the general ground that nullity, just as much as divorce, pertains to status and should therefore be a matter for the personal law is a strong one. More particularly the ever narrowing gap⁴ between the consequences of voidability and those of dissolution makes for the assimilation of the principles governing voidable marriages to those governing divorce.

On the other hand, the decision in *Abate v. Abate (orse Cauvin)* provokes the question: Will the *Armitage* version of *renvoi* be extended to all cases of recognition of foreign nullity decrees? Suppose that in the *Abate* case the parties had never been domiciled in Italy but that the marriage had taken place there (and if necessary the parties were resident there) at the time of the Swiss proceedings. Would the Swiss decree then have been recognized in England on the grounds that it would be recognized in Italy and that, had it been pronounced in Italy, it would be recognized here? Logic would appear to require an affirmative answer. But in *Mountbatten v. Mountbatten*,⁵ a divorce case, Davies J. resisted the force of an analogous argument and declined to recognize a Mexican decree although it would have been recognized in the courts of New York, whose own actual assumption of jurisdiction would in the circumstances have been recognized in England under the rule in *Travers v. Holley*.⁶

Armitage v. Attorney-General was decided as a divorce case at a time when domicile

¹ *Scrimshire v. Scrimshire* (1752), 2 Hagg. Cons. 408; *Sinclair v. Sinclair* (1798), 1 Hagg. Cons. 294; *Mitford v. Mitford*, [1923] P. 130; *Corbett v. Corbett*, [1957] 1 W.L.R. 486.

² *Sed quare* whether the parties must be resident in the *forum celebrationis* at the time of the commencement of the proceedings.

³ Basically this, of course, is still the position. But in cases in which jurisdiction is assumed under the Matrimonial Causes Act, 1950, section 18, an English court will apply English domestic law although it is not the law of the domicile. It is significant that the legislature thought it necessary to enact this expressly (now section 18 (3)).

⁴ The children of a voidable marriage which is annulled are no longer rendered illegitimate (Matrimonial Causes Act, 1950, section 9). Since *De Reneville v. De Reneville*, [1948] P. 100, it has been clear that in a voidable marriage the wife does acquire the domicile of her husband by operation of law.

⁵ [1959] P. 43; noted this *Year Book*, 35 (1959), pp. 269-72.

⁶ [1953] p. 246.

alone gave a foreign court jurisdiction in such cases. It was decided on the basis of giving fullest respect to the courts of the domicile in this a matter of status. Viewed in this way it seems to the present writer to be above criticism. Its extension to cases such as *Mountbatten v. Mountbatten* might have been justified as a part of the somewhat piecemeal arrangements (exemplified by section 18 of Matrimonial Causes Act, 1950, and the *Travers v. Holley* line of cases) to which it has been necessary to resort in order to avoid some of the more gross injustices which would otherwise result from the continued inapplicability to married women of the normal rules relating to the determination of domicile. But the extension of the *Armitage* doctrine into an area like nullity in which, for better or for worse, the pre-eminence of domicile is not clearly established would seem to involve matters of principle which it is submitted, but with the greatest respect, warrant fuller treatment than is provided in Lloyd-Jones J.'s very brief judgment.

Succession to immovables

Case No. 2. In *Philipson-Stow v. Inland Revenue Commissioners*¹ the House of Lords (Lord Radcliffe dissenting) has reversed the decision² of Upjohn J. which had been upheld in the Court of Appeal (Harman L.J. dissenting³). In so doing their Lordships have drawn attention to the wide scope of operation afforded to the *lex situs*, as such, in cases concerned with succession to immovables. This may perhaps have greater long-term significance than the actual decision which is concerned with the construction of particular words in a particular statute.

A testator, domiciled in England, made a will in English form and expressed the wish that 'this my will and any codicil I make shall be construed and operate as far as the case admits according to the law of England'. He devised and bequeathed the residue of his estate to trustees on trust for sale to be held as if the moneys and investments representing the same were capital moneys arising from his 'settled estates'. His 'settled estates' consisted of English property which he devised to the use of his wife for life with remainder to the use of his eldest son for life with remainder to the use of the sons of his eldest son successively in tail male with remainders over. The testator died in 1908, domiciled in England. His wife died in 1930. The eldest son died in 1954. The testator's residuary estate included land situated in the Union of South Africa, which property the trustees, in exercise of a power to postpone sale contained in the will, had retained.

A question arose as to whether the South African property was excluded for estate duty purposes from the property passing on death by virtue of the provisions of section 28 (2) of the Finance Act, 1949. This section provides that property passing on the death of a person

'shall be deemed for the purposes of estate duty not to include any property passing on the death which is situate out of Great Britain if it is shown that the proper law regulating the devolution of the property so situate, or the disposition under or by reason of which it passes, is the law neither of England nor of Scotland and . . . (c) that the property so situate is by the law of the country in which it is situate, immovable property.'

There was no doubt that the land was, by the law of South Africa, immovable property. The narrow question was therefore as to whether the 'proper law' was English or South African. Upjohn J. held it to be the former and that estate duty was accord-

¹ [1961] A.C. 727.

² [1960] Ch. 313.

³ [1959] Ch. 395; noted this *Year Book*, 35 (1959), pp. 272-3.

ingly payable. This was upheld by the Court of Appeal but reversed in the House of Lords.

Lord Simonds noted that to interpret 'proper law' as being simply the *lex situs* would not necessarily imply that the section contains a tautology: the *lex situs* might occasionally consider property to be immovable and at the same time regulate its devolution of disposition by reference to some other law. 'But, tautology or not, the question is, what was the proper law regulating the devolution of the South African property or the disposition under which it passed?'¹ In answer to this question his Lordship concluded: 'I am clearly of opinion that while foreign land is foreign land its disposition and its devolution are regulated by the law of the country where it is situate.'² In construing the section Lord Simonds found the use of the word 'proper' in the phrase 'proper law' unhelpful. It might be argued by analogy from its use in the field of contract that it requires that the intention of the settlor be taken into account. But this pertains to the construction of the disposition not to its 'regulation'. In this latter sphere 'whatever the settlor's intention it cannot prevail against the relevant law'.³ It is irrelevant that there may, as it happens, be no material conflict between the law of England and that of South Africa: the point is that in the event of any such a conflict the law of the South African *situs* would prevail and in this sense South African law 'regulates' the disposition. The word 'disposition' is, of course, taken to refer not to the will as a whole but to the particular provision dealing with the property in question: it is the nature of the property that imports the proper law.

Lord Reid, Lord Tucker and Lord Denning concurred. Both Lord Reid and Lord Denning emphasized the distinction between construction and validity or regulation. Lord Reid said:

'clearly there can be no selection by anyone of the law which is to apply on intestacy and I know of no authority to the effect that a testator can select the law which is to regulate the provisions of his will. He can, of course, "make his own dictionary". It may appear from the terms of his will that he is using some word or phrase in an unusual sense. But it appears to me that the law which regulates his disposition of movables must be the law of his domicile and the law which regulates his disposition of immovables must be the *lex rei situs*.'⁴

Lord Denning said:

'in construing a will, so as to see what the testator meant, every civilised country looks to see what he intended—and for this purpose you may legitimately look at the law he had in mind—but you only do this as a guide to find his meaning. You do not do it so as to find out the law which regulates his dispositions. He has no choice about that.'⁵

Lord Radcliffe in a very full dissenting opinion rejected the view that the 'proper law regulating the . . . disposition' means, in the context of the section, simply that system of law without whose sanction the terms of the disposition would not be effective and said: 'in my opinion, in the case of a will or settlement, "the proper law" means the system of law by which trusts created under it are to be taken as governed, and in an English settlement of the proceeds of sale of foreign land that proper law is English'.⁶ It is to be noted that his Lordship's dissent is as to the construction of the phrase 'proper law regulating the . . . disposition' in the context of section 28 (2) and he concludes that it does not mean (in the case of immovables) simply the *lex situs*. He agrees

¹ *Per* Viscount Simonds at p. 741.

³ *Ibid.*, p. 742.

⁵ *Per* Lord Denning at pp. 761-2.

⁶ *Per* Lord Radcliffe at p. 758.

² *Ibid.*, p. 745.

⁴ *Per* Lord Reid at p. 748.

with the general principle that 'it is indeed true that the effectiveness of any disposition which purports to dispose of the title to land or whatever ranks as an immovable is governed by the *lex situs* (see for instance, *In re Moses*,¹ *In re Miller*²)' but he continues, 'I am not aware that the description "proper law" had ever been given to the law in this relation'.³

P. B. CARTER

¹ [1908] 2 Ch. 235.

² [1914] 1 Ch. 511.

³ *Per* Lord Radcliffe at p. 753.

REVIEWS OF BOOKS

The Law of Treaties. By LORD McNAIR. Oxford: at the Clarendon Press, 1961. xxi+789 pp. (728 text+61 appendices and index). Price £4. 4s.

I

With the publication of this notable volume Lord McNair has reached, if not the culmination (which he achieved some time ago), at any rate the completion for the time being, of a venture that he has been engaged upon for more than a quarter of a century, during such leisure as his administrative and judicial duties over that period have left him. Because of that, it will be appropriate here to say something about the nature of this venture in general, as well as about the particular book under review.

This book, as Lord McNair indicates in the Preface, is to be cited as the *Law of Treaties*, 1961. The venture, however, started with the original *Law of Treaties*, published in 1938, and henceforth to be cited as the *Law of Treaties*, 1938; for the present volume is not to be regarded as a mere second edition of the original one, but as a completely revised, new and independent work.

The venture was carried forward, and indeed found its culmination, in the appearance in 1956 of Lord McNair's monumental three-volume *International Law Opinions*. In this work the section on treaty law was left blank, except for a note (see vol. 1, p. 225) the practical effect of which was to specify the *Law of Treaties*, 1938, or any new edition or revision of it, as being the treaty law section of the *International Law Opinions*. The present volume is therefore to be regarded as in effect a fourth and completing volume of the *Opinions*, even though some of the material in it appeared earlier.

The distinctive feature of the whole concept (though by no means exclusively, especially in the *Law of Treaties*, 1961) is the extent to which use has been made as principal source material, of the opinions (technically, the 'Reports') given over the centuries by the Law Officers of the Crown in England, including under the term 'Law Officers' the long and distinguished line of the incumbents of the office of King's (or Queen's) Advocate, and the other members of the institution of Doctors' Commons who were from time to time called upon to advise the Crown on international law questions during the period when that office and that institution were still extant.¹ The seminal work of Professor H. A. Smith, *Great Britain and the Law of Nations*, the first volume of which was published in 1932,² drew attention to the wealth of largely buried and unknown international law material to be found in the English

¹ The office of Queen's Advocate was abolished in 1872 on the retirement of the last holder of it, Sir Travers Twiss. 'Doctors' Commons', the home of the 'civilians' practising in matters governed by Roman civil rather than by English common law, came into existence in the neighbourhood of St. Paul's in the sixteenth century. It was incorporated in 1767 under the name of 'The College of Doctors of Law exercent in the Ecclesiastical & Admiralty Courts'. It was through their Admiralty work that the Doctors (of whom the King's (Queen's) Advocate was normally one, became conversant with the practice of international law. The College was dissolved after the passage of the Court of Probate Act, 1857 (see per McNair in *Transactions of the Grotius Society*, 39 (1953), pp. 185, 203-4), reprinted as Appendix II of vol. 3 of Lord McNair's *International Law Opinions*, at pp. 409 and 424-5.

² P. S. King & Son, London. See per Mervyn Jones reviewing Lord McNair's *International Law Opinions* in this *Year Book* (1957), at p. 348.

Law Officers' Reports, but hardly did more than scratch the surface of this rich vein. Lord McNair has, subject to the limitations of official permission,¹ fully uncovered—both in depth and in extent—all the material in the international law field deriving from this particular source. Nor (and in this lies one of the great differences between his volumes and an ordinary digest of international law) has he been content merely to cite more or less brief excerpts on particular points from the Law Officers' Reports. On the contrary, these are quoted *in extenso* or *in majoram partem* so that the reader can appreciate the entire context in which the relevant opinion was given. This is frequently reinforced by the setting out of the Foreign Office 'instructions' containing the request for the opinion, and, in some cases, the resulting dispatch from the Foreign Office to a diplomatic post abroad, based on the advice given by the Law Officers. In short, these Reports are cited not merely in order to prove or support some particular legal view (though they of course do that) but, additionally, to display the whole legal setting in which a given event occurred.

Lord McNair does not, however (and more particularly with reference to the *Law of Treaties*, 1961), rely exclusively on the Law Officers' Reports for source material, but includes also citations from decided cases both national and international, the Foreign Office archives, reports on treaty law furnished to the International Law Commission of the United Nations, and many other sources. To that extent, the work resembles, or has affinities with, digests of the excellence of those of Moore and Hackworth. But it is not basically a digest and does not purport to be. On the one hand, it does not attempt the comprehensiveness that is the aim of a digest as such. On the other, it lacks wholly the impersonal, almost astringent character of most digests which, by and large, give the material, and refrain from comment; or at any rate from any attempt at critical appreciation. The present volume is, on the contrary, enriched by an extensive commentary, and is a work of highly individual and personal scholarship, which repays careful study quite apart from the value of the information and materials it contains. It is highly readable in its own right, and in no sense simply the work of reference that most digests essentially are.

II

Something must be said next about the philosophy that inspired this volume and the others that have gone to make up the work of Lord McNair in this particular sphere.

In the international field, the absence of any real law-giver, and of any complete and fully cohesive body of judge-made law, has forced international lawyers to look to two main sources for the finding of general legal rules (i.e. rules not deriving from, or dependent on specific treaty or convention). One of these, to use the terminology of the continental lawyers was and is *la doctrine*—rules worked out on a basis of first principles drawn from, in effect, natural law, or from the Roman *corpus iuris civilis*; or latterly, from the 'general principles of law' referred to in Article 38, paragraph 1, of the Statute of the International Court of Justice. The other, and for the Anglo-American jurist, generally the more favoured source, has been State practice—the

¹ Leaving aside the question of Crown copyright, there is no difficulty about material outside the so-called 'closed period' of the immediately preceding fifty years, i.e. now, roughly, prior to the First World War. Permission for the publication of Law Officers' Reports within that period has only rarely been given. The Foreign Office, on the other hand, subject to any special security consideration arising with reference to a particular document, has usually been willing to give permission for the publication of specifically legal material in the archives, even if within the closed period.

actual practice of States in so far as it could be ascertained and established. These attitudes in their pure form might be summarized by saying that, according to the first, the law is, or should be deemed to be what, on a basis of reasoned principle, it ideally *ought* to be; whereas, according to the second, the law is what the practice of the generality of States in fact makes it, whether this is ideally good, bad or indifferent. It is not proposed here to discuss the merits of these respective attitudes, except to say that neither by itself, or in its extreme form, suffices, or will quite do; and that, as is being increasingly recognized, international law has need of both. Surprisingly often, both lead to a similar practical result in concrete cases, but by different roads; and in any case the difference of approach is very marked.

While it would be untrue to say that all so-called 'continental' international lawyers have been naturalists,¹ or that all Anglo-American ones have been positivists,² it is the fact that the one trend has represented the natural attitude of the first school, and the other that of the second. Continental writings on international law abounded even before the nineteenth century, but general treatises in English were then few and far between, although Zouche is generally recognized as being, with Grotius (whose tempered and relative positivism he shared), one of the founders of the modern law of nations. On the other hand, the influence of English judicial pronouncements on points of international law made by judges of the calibre of Sir Leoline Jenkyns, Lord Hardwicke, Lord Mansfield and others, had early been manifest; and one of the great merits of Lord McNair's work has been to demonstrate the extent to which, from quite an early date, English legal thinking, as exemplified in the advice given to the Crown by 'the Doctors', and acted upon by it in the international sphere, influenced, and in some cases permanently shaped, the development of international law through State practice.³

The nineteenth century, and the early twentieth, saw for the first time the veritable efflorescence of a distinctively Anglo-American school of international jurisprudence. This was the era of Kent, Storey, Halleck, Wharton, Wheaton, Dana, Lorimer, Phillimore, Twiss, Hall, Holland, Maine, Lawrence, Westlake, Smith (F. E.) and Oppenheim,⁴ to give a list that is by no means exhaustive, and that only goes as far as the first decade of the twentieth century—a list of jurists whose services to international law, in spite of all deficiencies and shortcomings, have been immense and will be enduring. Not all these jurists, as witness Maine, Lorimer and Westlake, were, or were in the fullest sense, positivists; but most of them were—some to an extreme extent—and positivism was certainly the distinguishing feature of the Anglo-American school of that period. Indeed, it sometimes seems as if many of these distinguished jurists must have been searching almost desperately for something which, from the point of view of their particular philosophy, was necessary in order to establish international law as

¹ Consider, for instance, Bynkershoek, Moser, de Martens, and von Liszt; and there is also a distinctly positivistic trend in Wolff, de Vattel and Anzilotti.

² Consider, for instance, Lorimer, Maine and Westlake, none of whom could be regarded as being positivists *simpliciter*.

³ The whole of Lord McNair's *International Law Opinions* evidences this; but for an excellent summary of the same matter from the same quarter, see the address given by Lord McNair to the Edinburgh meeting of the Grotius Society in 1953, entitled 'The Debt of International Law in Britain to the Civil Law and the Civilians' (*Transactions of the Grotius Society*, 39 (1953), pp. 183-204).

⁴ Oppenheim's continental origins made it certain that he could never disinterest himself in theory. But after he had settled in England at about the age of 37, his outlook became (if it had not already caused him to come to us) very English, and this was reflected in his celebrated treatise published about ten years later, and now regarded the world over as representing in its successive editions, the essence of the English viewpoint.

a true legal system, and not merely as a code of *de facto* usage, comity, or moral obligation. For this there were various reasons. Most of these jurists were deeply impressed by, even if they did not always themselves share, the instinctive Anglo-American receptiveness accorded to the Austinian *fiat* that nothing was law that was not enunciated by an authorized law-giver, and enforced by a legitimate executive power. Some of those concerned were certainly still under the influence of that formalism which the dominance of the old 'forms of action' imparted to so much of English legal thinking—the régime according to which the validity of a plea depended not so much—or not only—on its substantive content, but upon its being formulated under the right technical head or rubric, and in the precisely correct and prescribed terms. Although the forms of action, as such, were abolished in the period 1832–73, their spirit remained, and colours our attitude to this day. All jurists of the Anglo-American school were also mindful of their heritage of concrete judicial precedent, as the source of almost all rules of law not deriving from pure custom or Statute. Under these influences, they consequently sought to give to international law as solid a *substratum* as they could; and in so far as international judicial precedent might be (and at that date probably was) lacking, they based themselves on the only concrete feature of the international legal scene that they could discern—namely State practice. Where there was a consistent and general State practice, accepted by States as something to which they ought to conform, and regarded by them as something they were entitled to expect from one another—there was *law*. Short of that, there was only comity, courtesy and usages (such as the practice of flag salutes at sea), all of which might be habitual, desirable and normal, but which did not amount to a régime of legal obligation. Possibly the positivists carried their positivism too far. Nevertheless, the services they rendered were inestimable. It is not too much to say that it is largely due to their efforts (whether they belonged to the Anglo-American or continental school of positivists) that international law today rests on relatively secure and concrete foundations, which the many set-backs of the past half century have not seriously shaken, much less destroyed.

By 1930, however, in the period between the two wars, there began to be seen, even in Anglo-American legal circles, the beginnings of a reaction against positivism, at any rate in its pristine form—a reaction which grew in strength after the second world war, and which is still in full flood.¹ It was not so much that positivism as such became discredited, for a general and well-established State practice can never be less than good *evidence* of what the law is, on the point to which it relates, even if it is not actually constitutive of the rule of law concerned. It was rather that State practice was increasingly found to be inadequate as a source of supply for the rules needed to meet the new situations that were arising. In the 1930's, and increasingly since, the emergence of new States; the setting up of a host of international organizations; certain relatively new features of the international scene—at any rate as regards scale and frequency—such as diplomacy by conference, and law-making by general multilateral convention; new problems arising out of such matters as refugees, statelessness, asylum, minorities, human rights, the status of the individual, mandates, trusteeships, war crimes, the position of the civilian and non-combatant in modern war, hostilities falling short of war, the opening up of the air, and now (potentially) of space, nuclear weapons, telecommunications, broadcasting, fisheries, the continental shelf, flags of convenience, the nationalization of industries and undertakings, new problems of State succession,

¹ Such authorities as Lauterpacht in England, and Kelsen, Kunz and Jessup in America, have been evangelists of a new fusion between naturalism and positivism.

of the recognition of States and Governments, and of the treatment of foreigners, foreign interests, and foreign diplomatic and consular agents—to mention only some of the more obvious among the topics concerned—all these gave and still give rise to situations where, precisely, State practice is either non-existent or uncertain, or divergent or contradictory, and where no alternative exists but to work out appropriate rules on a basis of theory and first principles, derived from the *reines jurisprudence* (pure law) of the continental legal philosopher.

The outcome of The Hague Codification Conference of 1930, the agenda of which was supposed to consist of topics the subject of well-established and recognized categories of State practice, was symptomatic of much that was to follow, culminating in the recent controversies over the supposedly traditional and (in the nineteenth and early twentieth century) almost universally applied rule of the three-mile limit for the territorial sea.

In these circumstances there was—and is—a real danger of the reaction against positivism going too far,¹ and of the validity and worth of State practice being forgotten. However desirable, and indeed necessary, it may be, at a certain point, to work out new or revised rules on a basis of sound theory and first principles, it can never be necessary or desirable—it can never be right—to dispense with or ignore what Lord McNair has so aptly called ‘hard law’, derived from judicially decided cases and from ascertained State practice.

‘Ascertained’—therein lay the rub; and there—though to a now considerably diminished extent, due to the efforts of Lord McNair and others—it still lies. Lord McNair was never a government lawyer, but his contacts enabled him to realize that the major part of the practice of international law, unlike that of domestic law, floats like an iceberg below the surface, and is never seen. International law is popularly supposed to be ‘more honoured in the breach than the observance’. Lord McNair, on the contrary, with a clear-sightedness vouchsafed to few, saw, as he has often since proclaimed, that international law is habitually *observed*; but, because the breaches make news, whereas the observances do not—indeed are scarcely registered outside the files and pigeon-holes of the official archives of Governments—this is something which has never really penetrated the public consciousness.

Lord McNair also realized, more clearly than most people, that outside judicial precedent and the texts of treaties and conventions, the major part of the ‘hard law’ of the international world, as evidenced in the current diplomatic interchanges and transactions between Governments, lies buried in recesses that seldom see the light of day, unless brought into the open by the industry and perseverance of such as he. These materials are contained in departmental papers showing the advice given to Governments by their legal advisers, whether official or ministerial;² in dispatches passing between Foreign Ministries and chancelleries and posts abroad; in notes addressed to foreign Governments—all of it material mostly unpublished; but much of it available in official depositories and record offices where, behind the brambles of the centuries,

¹ There is, however, to be found in the international legal thinking of the newer countries a sort of ultra or neo-positivism of a most iconoclastic kind. Those interested may be referred to some of the debates taking place yearly in the Assembly of the United Nations, and to such articles as the extremely well written but very controversial one by Judge S. N. Guha Roy (of India) in the *American Journal of International Law* (October 1961), entitled ‘Is the Law of Responsibility of States for Injuries to Aliens a part of Universal International Law?’

² The Law Officers of the Crown in England have ministerial though not Cabinet rank. For the position of the Legal Adviser to the Foreign Office (an official), see *Transactions of the Grotius Society*, 39 (1953), pp. 204–6 and 207–8.

and like the princess in the fairy tale, it awaits the seeker's awakening salute. Lord McNair saw that since the practice of consulting the Law Officers, or persons equivalent to Law Officers, on matters of international law, dates back many decades in this country, and had been very frequently followed, especially prior to 1886 when the Foreign Office first had its own permanent departmental legal adviser,¹ much of the law relied upon by H.M. Government would be found in the Law Officers' Reports which, as a collection have never been published, although, outside the so-called 'closed period', they are available in the Public Record Office.

The pioneer work of Lord McNair, following on that of Professor H. A. Smith, has already triggered off notable developments. Now a long way on the road to realization, there is a project for the publication of all the international legal material in the Foreign Office archives that does not have to be withheld on security grounds;² and a number of European Governments are also believed to be planning for the first time the publication of Digests of their international law practice based on their official records. As a servant of the law, Lord McNair is, in this matter at least, entitled to say his *nunc dimittis*.

III

It would be tedious, and a work of supererogation, to attempt any summary of the contents of this volume. Indeed, the whole spirit, character and object of it is alien to any such attempt. It is essentially a book the value, and the charm and individuality of which can only be appreciated by actual consultation and perusal. No summary could do it justice, or even fairly indicate what it is really like. As compared with the original *Law of Treaties*, 1938, however, it can be said that the present volume is of altogether greater weight and moment. In the Preface to the earlier work Lord McNair expressly disclaimed any intention of producing a systematic treatise on the subject in hand, pointing out (p. viii) that

'... my sources are almost entirely native, and moreover, I have made only the rarest reference to the literature upon the law of Treaties. It is therefore obvious that the book is in no sense a treatise on the international law of treaties, though I hope that its publication (and the publication of similar volumes in other countries) will make it easier to write that treatise in future. It is also clear that the book does not profess to include all the relevant and available materials. To do that several volumes would be required, but it is hoped that this selection is a representative one'.

He continued (*ibid.*):

'... I must ask the reader not to be surprised if he fails to find answers to some questions which naturally occur to his mind. This is not a treatise but a collection of opinions and practice, and I cannot make bricks unless I can find the straw.'

Up to a point, these disclaimers could also be made in regard to the present volume, and in particular Lord McNair would probably still maintain that the book does not amount to a treatise on treaty law. In fact—of its kind—it emphatically does do so. There is hardly any important—or even subordinate—aspect of treaty law that is not touched upon and illuminated by source material and commentary of the utmost value. It is no longer true that the sources 'are almost entirely native'; and the original subtitle 'British Practice and Opinions' has been dropped, for, as Lord McNair says in his Preface to this volume:

¹ See *ibid.*

² Under the auspices of the International Law Fund and of the British Institute of International Law.

'The present work has been written from a more international point of view. While eliminating some of the purely British material, I have enlarged the book and introduced much material from international sources.'

It is equally no longer the case that the volume makes 'only the rarest references to the literature upon the law of Treaties', for on the contrary, every chapter is now headed by a compendious list of all the principal works, British and foreign, bearing on the subject-matter involved. The original 550 pages (approximately) have been expanded to close upon 800 (including new appendices), an increase of over 50 per cent.; and the work has a far greater range and comprehensiveness than the original. For instance, Part IV of the 1938 volume on the 'Termination and Modification of Treaties' is now expanded into Parts V to VIII inclusive, covering the 'Termination of Treaties', 'Breach of Treaty', 'State Succession and other Changes' and the 'Effects of War'. There is also a much more thoroughgoing coverage of such difficult and controversial topics as interpretation, essential validity, and reservations, to name but a few.

It will suffice by way of summary to say that, alike to the student embarking on the subject; to the scholar presumed to be versed in it; and to the practitioner advising on or forensically active in it, this book is indispensable; and must also form part of any serious international law library, whether private or public.

If there is any matter for regret, it is the relative restraint and economy of Lord McNair's own commentary. But within the limits of the task he set himself, and of a volume of reasonable size, he could not, consistently with his aim of doing justice to his source material, have included much more. The commentary he does furnish is ample for what is really needed, namely for the elucidation of the source material, for making clear the nature of the relevant United Kingdom practice, for filling in gaps, and for dealing with points of obvious doubt and difficulty. More one may want; but more would perhaps only have endangered the freshness of a work of mingled art and science, unique of its kind.

G. G. FITZMAURICE

Académie de Droit International de la Haye: Recueil des cours, 1959. Volumes 96, 97 and 98. Leyden: A. W. Sijthoff, 1960. 665 pp., 593 pp. and 626 pp.

The three ample volumes of the collection for 1959 are devoted for the most part to consideration of fairly specific problems of international law and international organization. If there is any special emphasis, it is on international economic and financial institutions. Several familiar themes are provided but there is a general awareness of contemporary problems and the need to relate legal technique to the technical and economic factors arising from the subject-matter.

The first volume commences with a study by Dr. F. A. Mann devoted to 'Money in Public International Law' which is of great value. He is, of course, already well known for his contributions to knowledge of this subject, and the relations between the present lectures and his previous works must be explained. His original article on the subject in this *Year Book*, 26 (1949), p. 259 was later incorporated in revised form in *The Legal Aspect of Money* (2nd ed., 1953), pp. 417 et seq., and *Das Recht des Geldes* (1959). The author states that the present lectures to some extent constitute a fresh approach to the subject, but they both exclude some of the topics previously discussed and add new topics and new material. He observes that 'even in the short space of the last

fourteen years the development has been so rich as to render international monetary law a striking example of the progressive evolution of international law as a whole'. As a consequence of this he makes no apology for the fact that suggestions made in these lectures differ from views expressed in the earlier publications. Dr. Mann's material is concerned with problems and institutions currently of importance. Chapter II, on money as a matter of international organization, contains excellent accounts in a small compass of the International Monetary Fund, G.A.T.T., O.E.E.C., E.P.U., the Common Market and bilateral organization of international payments. This is followed in the next chapter by an examination of some of the problems of interpretation raised by the many treaties relating to monetary questions. This examination involves the reduction of some of the concepts and devices of international finance to some form of precision and the successful demonstration that certain of these concepts are inherently vague in economic terms, for example, 'multilateral system of payments', 'current transactions' and 'exchange restrictions'. In regard to the last-mentioned topic, there are some interesting comments on the case concerning *Rights of Nationals of the United States of America in Morocco*, *I.C.J. Reports*, 1952, p. 176. His fourth chapter is concerned with the position in customary international law and includes useful discussions of the case of *Certain Norwegian Loans*, *I.C.J. Reports*, 1957, p. 9, and the effect of devaluation and abrogation of gold clauses. His view, that devaluation, imposition of tariffs and the like, do not involve a taking of property by the State concerned, does not seem logical, and the qualifications offered in regard to cases of abuse and discrimination are somewhat vague. It would seem that such measures involve the taking of property and that the subject must be related to the general questions relating to confiscation. The last chapter is concerned with the monetary law of inter-State obligations and deals with the determination of the money of account in treaties, the money of account of damages, the possibility of revalorization and other technical problems of monetary value.

Professor Sereni's contribution on the 'International Economic Institutions and the Municipal Law of States' is also concerned primarily with the contemporary economic scene. He is concerned with the legal relations of entities engaged in international activities, including sovereign States, international organizations such as the International Bank, private businesses, and State agencies or corporate bodies with some governmental powers, for example, the Export-Import Bank in the United States. Much of his discussion is concerned with the legal problems besetting such entities in the context of national systems of law and, in particular, questions relating to the conferment of legal personality. However, the most interesting questions of principle considered are those concerning the problem of choice of law. By what law are the various agreements between Governments and 'international economic institutions' to be governed? The existing possibilities include the internal law of the institution if it is an international organization, the national law of a State, and international law: where the institution has no personality in international law and does not act as the agent of a Government, the choice is, of course, more restricted. Professor Sereni does not agree with those, like Dr. Mann, who see the need for a *tertium quid* in addition to national and international law, a commercial law of nations, and he also asserts that all agreements are made in the context of some existing and definable system of law. With respect, it may be thought that he is not convincing on these issues. In the *Abu Dhabi* arbitration, *International Law Reports*, 1951, p. 144, the umpire was forced to adopt a sort of 'modern law of nature'. Professor Sereni is obliged to explain that this was really an incorporation of certain principles permitted by the law of Abu Dhabi as the

'proper law'; but the umpire seems to have expressly rejected the law of Abu Dhabi *as such*. Moreover, it is clear from the clauses on 'choice of law' in agreements such as that between the National Iranian Oil Company and the Consortium that these parties do not contemplate the application of either national law or international law but principles of law 'common' to the municipal law systems in which the parties are incorporated. Reference to international law is inappropriate if the parties are not all Governments or agents thereof. Further, reference to municipal law is also unlikely to be intended in many cases either for technical reasons (the absence of local law on the subject) or for policy reasons. In the latter connexion provisions to the effect that local legislation cannot invalidate the agreement are not likely to be effective if local courts are to have the opportunity of applying rules as to form and capacity or, perhaps, of ruling that the agreement, in whole or in part, is unconstitutional. Whether or not one agrees with all his opinions, Professor Sereni raises all the important questions and provides a stimulating discussion of some immensely interesting topics.

Students of comparative law and the problems of the unification of private law will find much of interest in Allan Philip's discussion of 'The Scandinavian Conventions on Private International Law'. The first two chapters are devoted to the history and machinery of co-operation in this field between the Scandinavian countries. The conventions deal with intra-Scandinavian conflict problems which arise partly because, even when it has occurred, unification of private law has been carried out in such a way that complete uniformity has not been attained. A particular source of problems has been the fact that the principle of nationality has been accepted in Sweden and Finland, but Denmark, Norway and Iceland adhere to the principle of domicile. The conventions under discussion contain an interesting compromise solution: a domicile of a certain minimum duration is required. The subject-matter invites comparison with the Benelux developments in regard to the unification of private law and The Hague Convention of 1951 on the regulation conflicts between the principles of nationality and domicile. The conventions considered here are as follows: the convention on marriage, adoption and guardianship (1931), the convention on collection of maintenance claims (1931), the convention on mutual recognition and enforcement of judgments (1933), the convention on bankruptcy (1934), and a convention relating to the law of succession (1935). In the course of describing and interpreting these conventions, Allan Philip makes comparisons with French and Benelux proposals on their subjects.

Professor Accioly, author of what may be called a modern classic on international law and legal adviser to the Brazilian Ministry of External Relations, has produced a short but very useful course on 'Principes généraux de la responsabilité internationale d'après la doctrine et la jurisprudence'. He concerns himself with the delictual aspects of State responsibility and discusses familiar problems relating to responsibility for acts of State officials and of private individuals, damage from riots and civil war, the local remedies rule, denial of justice and the Calvo clause. If any criticism of this type of succinct exposition is justified, it might take the form of two suggestions. First, the reader might profit more from an analysis of the problems in which the quotation of academic opinion, sometimes repetitive, was confined to footnotes or otherwise abbreviated. Secondly, the method adopted by most, and perhaps all, writers on State responsibility might be improved by an attempt to distinguish questions of fact and questions of law. Much of the material derives from particular illustrations of what is, or is not, due diligence in regard to controlling, or insuring against, sources of harm within the limits of State sovereignty.

With the next contribution we return to the legal problems of European economic

life. Yvon Loussouarn considers 'La Condition des personnes morales en droit international privé'. Half of his discussion is devoted to problems of nationality. The legal material deployed is predominantly French but there is careful reference to the treaty creating the Common Market, and The Hague Convention of 1956 on the international recognition of the legal personality of corporations and other group entities. The first volume of the collection for 1959 concludes with a study in the sociology of international law, 'Genèse et structure de la société internationale' by Professor Truyol y Serra. Many of his individual themes are now commonplace but the piece remains a source of many ideas and stimuli to further thought whether or not the reader finds the inevitable multitude of generalizations and assumptions acceptable. It may seem pointless to comment on the composition of so broad a canvas but two, not insubstantial, omissions occurred to this reader. The first concerns the impact of organized and well-disseminated political ideas and philosophy, in other words, ideology, on modern life. Professor Truyol y Serra fails to emphasize this and to see that its consequence is that the unit of the State is no longer politically encapsulated; and as a result he does not mention, except very obliquely, the competition between communism and other ideas. The second omission is the absence of any discussion of the *forms* which competition and conflicts between groups may take, *inter alia*, subjects unhappily topical for our generation such as genocide and the use of nuclear weapons.

The delicate problems of fishery conservation and the forms of legal regulation so far adopted are given a searching examination by Professor Gros in his study 'La Convention sur la pêche et la conservation des ressources biologiques de la haute mer', with which the second volume of the collection commences. His sources are the Report of the International Law Commission on the subject, the documents of the technical conference at Rome in 1955 and the materials of the Geneva Conference in 1958. After consideration of some pre-existing treaty practice and the genesis of the text of the Convention signed in 1958, the solutions in the Convention to the incredibly complicated conflicts of interest in this field are analysed. The course ends with a very useful review of State practice since the Conference of 1958. Professor Gros approves of the solutions provided by the Convention and emphasizes their importance in the absence of agreement on the limits of the territorial sea.

Professor Alfaro is already well known as the draftsman of the Draft Declaration on the Rights and Duties of States presented to the first session of the United Nations General Assembly by the delegation of Panama. (See the annotated draft and other materials in the *Preparatory Study Concerning a Draft Declaration on the Rights and Duties of States*, prepared for the International Law Commission, 1948, A/CN.4/2.) The first chapter of the present study of 'The Rights and Duties of States' is concerned with the theory of the fundamental rights of States. Professor Alfaro considers that the four fundamental rights are those of sovereignty, independence, equality and self-preservation. He offers these as relative to each other and not absolute, and states that their content is defined by international law. At this point it may be pertinent to inquire whether in fact the attribution of the quality of being fundamental helps any discussion of the law. It would seem that the rights he postulates are political and moral in character, and are legally relevant only in so far as they tend to determine the content of particular rules of international law and perhaps create presumptions which affect the application of particular rules and the interpretation of treaties. Otherwise, they are too vague in content. To be more specific, Professor Alfaro conceives of independence as freedom from external control. Yet in practice and principle, independence is a fact with important legal consequences. Determination of the existence of the fact is

not properly organized and not always very objective as a consequence. Thus many States which are today regarded as having full personality are by no means free from external control. Again, the statehood of Germany under Allied occupation after 1945 remained, and that of the Congo Republic during the present period of *de facto* partition and political chaos remains, in spite of external control and/or interference. To speak of independence as a legal right is to beg these and other questions. Criticisms of this sort do not, however, alter the historical fact that the concepts and drafts of Rights and Duties of States have been of great value in aiding the systematic development of international law. The main substance of Professor Alfaro's contribution consists of the detailed history and historiography of the notion, and of draft declarations, of the Rights and Duties of States, and of declarations of principles *in pari materia*.

Mr. Vallat contributes an interesting course on 'The Competence of the United Nations General Assembly'. His approach to the basic question of interpreting the Charter is to avoid laying too much emphasis on purely linguistic analysis and to regard the instrument as a constitution. As he says: 'In relation to the organs of the United Nations it should be interpreted not literally or rigidly as a contract or statute might be in municipal law, but with flexibility so that the organisation may develop and be effective to fulfil its basic purposes.' Applying this approach he is not prepared to accept lightly arguments directed against the Uniting for Peace Resolution and argues that Article 10 provides the General Assembly with the necessary residuary powers. It is difficult to be dogmatic on this question but Article 39 and the structure of Chapter VII of the Charter cannot be interpreted away altogether. Moreover, in this connexion it would have been pertinent to refer to Articles 5, 50, 53 and 99. He is correct in asserting that the practice of organs may bring about developments but he fails to follow this up sufficiently. It may be that a generally accepted interpretation may create estoppels and indeed this may have happened in regard to the Uniting for Peace Resolution (see Petersen, *International Organisation* (1959), vol. 13, pp. 219-32; and cf. the case of the *European Commission of the Danube*, *P.C.I.J.*, Series B, No. 14, p. 23). The U.S.S.R. has acquiesced in the use of the machinery of the resolution on several occasions. At the same time, a word of warning would seem to be necessary. The General Assembly and Security Council make decisions in accordance with political criteria and this fact coupled with liberal interpretation of the Charter may lead to arbitrariness, real or apparent, and consequent disrespect for the Organization or its organs in the world at large.

The course on 'Droits de l'homme et relations internationales' by Dr. Ernest Hamburger is concerned with the abundance of evidence of the interrelation of internal developments in the protection of human rights and the quality of external relations and international life generally. The theme is pursued with a wealth of historical illustration and great breadth of learning. This historical progression leads to the United Nations Charter and the Universal Declaration of Human Rights adopted by the General Assembly in 1948. Rather surprisingly, there is no reference to the European Convention on Human Rights and the institutions based upon it. After reading of the innumerable declarations of principles from the eighteenth century to the present and relating them to the history of the States concerned, one is struck by the grave functional limitations of these instruments. They frequently lack legal guarantees and, the more fundamental defect, their fulfilment depends on general political, social and economic progress. In spite of the generality of his title, 'Principes du droit international privé', Professor Batiffol is concerned in his course with a prognosis for the development of private international law, viz. to consider practical means for increasing uniformity of decision as between different jurisdictions. He eschews both

'particularism' and 'universalism', and favours more recourse to comparative law as a source of sympathetic and intelligent reference to institutions of foreign law in the course of applying rules of private international law. He also considers that in some situations *renvoi* has a constructive role to play in maintaining uniformity of decision regardless of the form chosen. His third and final chapter contains a lengthy survey of nationality and domicile as connecting factors, which can be supplemented by reference to Allan Philip's contribution in the first volume.

The third volume for 1959 commences with a very substantial course (289 pp.) by Professor Quincy Wright entitled 'The Strengthening of International Law'. The first part of this study is an examination of the conditions in which international law exists. Discussions of a great many questions are woven round five main problems: the need to create a spirit of internationalism and to give international law a proper place in education; the effects of developments in the technology of war and the dangers of the arms race; the working of law in a world containing great diversity of religions and ideologies; and the problem of collective security. The conclusion reached is that we are still in an era in which stability rests on a balance of power and that this situation has many dangers. In particular, if power becomes polarized, i.e. concentrated in a few centres, the system will become unstable. To those who doubt the respect for law, and the policies, of either, or both, of the two main *blocs*, his views will have considerable appeal. In his view:

'If alliances, federations or conquests reduce the number and equality of independent centers of power, it becomes more difficult to confront any one with insuperable power. If the number of centers is reduced to two, stability is at a minimum. Neither spontaneous balance of power politics nor organised collective security can work, because there is nothing to collect against the aggressor. As he is not likely to strike if weaker, his chances of success are equal if not greater than that of the champions of stability.'

Among the many problems he considers is the relation of 'orthodox' international law to the interests and ideas of communist and Afro-Asian countries, an issue all too often burked by Western writers. As to the general views expressed on international relations, of many things which could be said, there is one omission to which attention may be drawn. It would seem that the interplay of State power is increasingly influenced by the need to maintain diplomatic support from other Governments and from world opinion. Military adventures and intervention, whether successful or not, result either in actual loss of support or in a weakening of morale as a consequence of no longer seeming to act justly. Events in Cuba, Hungary and Egypt in recent times may be thought by some to show that to use force to protect 'vital interests' entails paying a high political price. Appearing to be right is now, more than ever before, practical politics, and an internationalist would do well to emphasize this.

In the second part of the contribution the internal inconsistencies and inadequacies of traditional international law are considered. Professor Wright considers the most glaring deficiencies to have been (1) the law's insistence that a sovereign State can not be bound by a new rule of law without its consent, (2) its toleration of war and neutrality, (3) its recognition in practice of great legal inequalities among States, (4) its insistence that only States and not individuals are its subjects and (5) its tolerance of the practice which permits a State to be judge in its own cause. These deficiencies are then treated in the context of developments in the substantive law since 1920. Of particular interest are the discussions of the law relating to the use of force by States, with some interesting suggestions as to the meaning of the concepts of breach of the peace, threat to the peace and act of aggression, self-determination and recognition, and the questions of human

rights and domestic jurisdiction. At least two of the positions adopted in this part may provoke dissent. In the first place, there is an assumption that, with the exception of 'humanitarian rights', the laws of war do not apply to an unlawful belligerent (pp. 154-6). The great majority of writers on this question are against any general discrimination, *inter alia*, on the grounds that an authoritative determination of the aggressor may be lacking and that a lack of reciprocity will cause reprisals and atrocities. Secondly, it may not be correct to interpret Article 2, paragraph 7, of the United Nations Charter, in accordance with customary international law on the question of domestic jurisdiction (see p. 204): the article is concerned with *competence* of the General Assembly and the omission of a reference to international law was deliberate.

The third and final part assumes that since 1920 a new international law has appeared which, in part at least, has remedied the deficiencies of the traditional law. The acceptance of the principles of the new international law by States has not resulted in their implementation in all aspects of actual practice. To fulfil its proper role the new international law must have certain qualities: it must be universal and not regional or ideological in character; it must be flexible in a world of rapid change; its principles must be secular and pragmatic and not religious and absolute; and, lastly, it must be tolerant of differences of outlook among the nations. Professor Wright has provided what is probably the best available survey of the perspectives of international law and the problems with which it is faced.

The volume continues with an excellent treatment of the 'International Legal Aspects of the Operations of the World Bank' by Aron Broches, general counsel of the Bank. His discussion necessarily includes interesting passages on the personality of international organizations and their treaty-making capacity. The loan and guarantee agreements made by the Bank raise some extremely interesting questions, touched upon also by Professor Sereni in the first volume, relating to the choice of law in international agreements. The practice of the Bank provides examples of references to, or incorporation of, municipal law, in instruments which nevertheless have the character of treaties. The question of guarantees also leads to problems of agency and of the proper classification of agreements as international or 'municipal' in character, since the position of a Government, guarantor of a loan to a commercial enterprise, is treated in the Bank's agreements as joint co-debtor. (See pp. 351-3.)

Fritz Munch contributes an able analysis, in the context of private international law, of the practice of courts in leading Western States in regard to the effect of acts of nationalization by foreign States. His examination is thorough and reveals the variety of technical approaches applied to the problems. The conclusions he offers, incidentally, on the effects of nationalization in public international law are in general accord with those of the majority of Western jurists. Much of the ground has been covered previously by Professor Wortley in the second volume of the collection for 1958 (pp. 192-252). The collection for 1959 is completed by a course on 'Droit international cosmique' by Professor Quadri. One may approach this subject with the feeling that the problem of relations in space is primarily one of organization and that the speculations of lawyers are premature and ill-advised, and Professor Quadri's material to some extent justifies this attitude. His own treatment, however, is refreshingly hard-headed and constructive in the sense that criticism, much of it well directed, of existing legal programmes is helpful. He provides a wealth of references to the literature of the subject, already extensive, clears the ground by rejecting much pseudo-science, and makes some attractive suggestions as to the scope of the subject and the problems which will arise.

IAN BROWNLIE

Académie de Droit International de la Haye: Recueil des cours, 1960. Volumes 99, 100 and 101. Leyden: A. W. Sijthoff, 1960, 1961. 621 pp., 687 pp. and 495 pp.

The appearance of the series of volumes for 1960 is notable for at least two reasons. First, the *Recueil* is certainly one of the most fruitful doctrinal sources for students of public international law and the publication of the hundredth volume in the series is obviously an occasion on which the governing bodies of the Academy, the Carnegie Endowment and the publishers must be congratulated. Secondly, the year 1960 was the fiftieth anniversary of the foundation of the Carnegie Endowment for International Peace in New York, and the anniversary has been marked by a lecture delivered at the Peace Palace by Professor Philip C. Jessup entitled 'A Half-century of Efforts to Substitute Law for War' which appears in the first volume of the *Recueil* for 1960. As Professor Jessup makes clear, the anniversary is not just a matter of the passage of so many years. The contrast between the state of international law and Organization in 1910 and its condition only two generations later is instructive and rather startling and should induce a degree of optimism at a time when gloom is fashionable. Moreover, research in the cause of peace is no longer regarded as exotic and the Carnegie Endowment is now accepted as a normal part of life's scheme. Professor Jessup remarks: 'The Endowment at first trod a rather lonely path; today it goes forward in the midst of a goodly company.'

At this point in its history some comment on the unique function of the Hague Academy in relation to the present stage of international relations would seem pertinent. Its functions in providing instruction of high quality to students of many nations and in producing valuable publications are very important but are by no means unique: national academies of science, specialized institutes such as the Max Planck Institute or the Institut des Hautes Études Internationales in Geneva, national societies of international law and national year books and reviews may fulfil one or both of these functions. What is unique and of particular significance is the character which it has as an international forum for the development of doctrine. It is now commonplace to state the need to adapt the 'classical international law', formed as a result of the practice and doctrine of the dominant Western States in the latter half of the nineteenth century and the earlier part of the present century, to the different interests of the 'new' states of Africa and Asia, and to the needs of an altered world situation in which the 'Western' States, with capitalist economies and the interests of the investor, are faced with varying degrees of competition, or hostility, from underdeveloped countries and the Communist States. The problems involved have been aired by, among others, Professor Jennings in his inaugural lecture on 'The Progress of International Law' (this *Year Book*, 34 (1958), 334), and Dr. Jenks in his book *The Common Law of Mankind*. The Academy is particularly suited to the very delicate task of developing and re-examining the law with the object of accommodating a variety of interests, and meeting the changing needs of international society, whilst keeping the fabric of the law intact. Its atmosphere is international, and the contributing lecturers are drawn from a variety of ideological backgrounds. Moreover, lecturers often make conscientious efforts to understand views and attitudes at variance with their own: witness the contribution by Quincy Wright in the third volume of the *Recueil* for 1959 and that of Max Sørensen in the third volume of the present series. This process of accommodation, albeit indefinite, can provide some of the groundwork for the labours of the International Law Commission. Contributors from States outside non-Communist Europe and

North America are still not very numerous but probably this situation cannot be attributed to any single cause. Difficulties of language and sheer distance, and the backwardness of higher education in many former colonies, provide at least a part of the explanation. Even assuming that changes in the policy of the *curatorium* might be considered desirable, the fact remains that apart from the specialist work of organs of the United Nations, the Institut de Droit International and the International Law Association on selected topics, the Academy provides the only truly international forum for the development of international law. Perhaps the only really comparable institution is the Inter-American Academy of Comparative and International Law, the lectures of which are published at Havana in the series *Cursos Monográficos*, but this has a regional basis.

Having digressed, it becomes necessary to regard the substance of the three volumes of the *Recueil* for 1960. The first volume commences with lectures by Professor Graveson on 'The Comparative Evolution of Principles of the Conflict of Laws in England and the U.S.A.' His objects are to examine, in outline only, certain parts of the Conflict of Laws, viz., problems relating to domicile, marriage and divorce, contracts and torts, and to draw some conclusions as to the differences and similarities between the two systems of conflict of laws. The principal differences he discovers are as follows: the influence of the federal constitution and its provisions as to full faith and credit and due process of law on the American law, the unitary character of the English law in contrast to the duality in the United States of inter-State and international rules of conflict of laws, the greater American emphasis on the jurisdictional aspect, and the closer American adherence to the common law rule of *locus regit actum*. The process of comparison involves some interesting comment on the sociology of the rules relating to domicile and other parts of the law. It may be noticed that the comments on *Monro Ltd. v. American Cyanamid Corporation*, [1944] K.B. 432 must now be read in the light of *Watson v. Winget* (1960), S.L.T. 321, and *The Wagon Mound*, [1961] A.C. 388. In view of the nature of the comparison undertaken, some references to Canadian experience might have been apposite.

There follows the study by Professor Carabiber entitled 'L'Évolution de l'arbitrage commercial international'. The study provides a succinct account of the history, related institutions, legal nature and technical aspects of commercial arbitration with particular reference to the legal systems of the United Kingdom, the United States, France, Italy, Germany and Switzerland. Special consideration is given to the question of the execution of foreign arbitral awards and the New York Convention of 1958 on the subject receives praise. Professor Carabiber is not content to give a static picture and considers the work being done to bring about further reforms in this field. In his conclusion he advocates the establishment of an International Court of Arbitration. Obviously the treatment is curtailed by the needs of space but one might have expected some adequate consideration of arbitration in socialist economies (cf. Grodecki in *The International and Comparative Law Quarterly*, 9 (1960), p. 177, and Faragó, *ibid.*, p. 682). On the more theoretical plane one may dissent from his views on the legal nature of arbitration: it can never be wholly 'conventional' and it is difficult to regard it as 'hybrid' since it is always the law which in the ultimate analysis gives efficacy to private arrangements. Professor Carabiber's advocacy of the autonomy of the will of the parties as a matter of policy seems to have infected his theoretical position.

Professor Cheatham's contribution on 'Problems and Methods in Conflict of Laws' provides a brilliant survey of the many questions of policy and technique raised by this part of the law. He is opposed to vested rights theory: in his view the proper

approach is to recognize the inherent complexities of conflict cases and to attempt to co-ordinate the various relevant policies in choice of law. This task is not considered to be different in kind from that of co-ordination and reconciliation in other parts of the law. These assumptions are the basis for Professor Cheatham's excellent treatment of the problems of characterization and *renvoi*. Dr. Coursier, legal adviser to the International Committee of the Red Cross, considers 'L'Évolution du droit international humanitaire'. His treatment is mainly historical and descriptive, with a proper emphasis on the role of the International Committee of the Red Cross in initiating developments in the law. The subject-matter relates primarily to that of the three Geneva Conventions of 1949 together with discussions of the protection of refugees, slavery and traffic in women, obscene publications and drugs. The treatment of matters of substance tends to avoid legal analysis and there is no reference to modern military manuals or national legislation. Nevertheless, some very valuable suggestions appear in a survey which was necessarily brief. The concept of international medical law involving a protected status for doctors is supported as a means of supplementing the Sick and Wounded Convention. In regard to the Prisoners of War Convention attention is given to the Korean repatriation problem and the application of article three to the Algerian conflict. Dr. Coursier has some interesting things to say about forbidden weapons in his discussion of the Civilians Convention, and suggests the extension of a minimum level of protection of the kind provided in the Convention to political prisoners and refugees. Lastly, two statements of fact occur which are open to correction. Is it true to say *simpliciter* (p. 388) that Japan and the U.S.S.R. in the Second World War were not bound by the Sick and Wounded Convention of 1929? And (at p. 392) Dr. Coursier is not aware that the United Nations Command and the Chinese People's Volunteers declared their intention to apply the Geneva Conventions of 1949 to the Korean Conflict (see Baxter, this *Year Book*, 29 (1952), p. 325 at pp. 355, 358, and Mayda, *American Journal of International Law*, 47 (1953), p. 414 at pp. 424-6).

The volume ends with lectures by Professor Stefan Glaser on 'Culpabilité en droit international pénal'. This study is based primarily on continental concepts of criminal responsibility and there is perhaps insufficient reference to the more obvious material on international crimes in international conventions and the war crimes jurisprudence; and yet the approach adopted provides some stimulating discussion of questions of principle. However, the section on omissions is less satisfactory than the others, based as it is too exclusively on propositions relating to the connexion between law and morals. It would seem to be more satisfactory to pursue the problems in terms of the elements of particular crimes.

The second volume commences with a brief but effective discussion by an Egyptian scholar, Dr. Boutros-Ghali, of 'Le Principe d'égalité des états et les organisations internationales'. The approach, which suits the subject-matter, is that of a political scientist. Dr. Boutros-Ghali's perspective is that of a world in which general acceptance of equality in law is accompanied by striking inequalities in fact; inequality in particular in terms of living standards. For example, income per head in India and in the United States was in the relation 1 to 35 in 1952 and the difference is increasing. Three concepts of equality receive analysis: equality in fact, absolute equality in law and relative equality or 'functional inequality' within the United Nations Charter. It is the latter concept which is given the closest attention. The thesis with which the discussion closes is that the principle of equality should be used within international organizations to democratize international society and thus to develop an equality of conditions of life between States. The next contribution is an excellent study by Professor Giuliano

of 'Les Relations et immunités diplomatiques'. This systematic study is a model of exposition, drawing fully on the variety of sources available while maintaining control over the material and considering problems of principle. Particularly ample is the treatment of the status of the suite of the diplomatic representative. Mention might have been made of the rule found in most legal systems that the children born to diplomatic staff do not become nationals of the host state by birth. Readers will now wish to refer to the Vienna Convention on Diplomatic Relations of 1961 (text in *The International and Comparative Law Quarterly*, 10 (1961), p. 600). Professor Alexandrowicz's study of 'Treaty and Diplomatic Relations between European and South Asian Powers in the Seventeenth and Eighteenth Centuries' indicates the amount of work still to be done on the history of international law. The subject-matter is closely related to his article in this *Year Book*, 35 (1959), p. 162, entitled 'Freitas versus Grotius', but the object of the study is rather different. Very briefly it is to show that the relations of European and Asian States from the sixteenth to the eighteenth centuries were conducted in the main in terms of a Law of Nations which assumed an equality of status as between the two groups of States. Research into a selection of treaties and documents of the period together with contemporary treatises on international law supports this thesis. Professor Alexandrowicz does not claim to have conducted an exhaustive inquiry; but suggests the conclusion that it is not possible to look at the past in terms of the assumptions of nineteenth-century European writers in international law based on a philosophy of European superiority and the 'civilizing mission'. His inquiry and his preliminary conclusions are of the utmost interest and should stimulate further research by specialists. *Obiter dicta* of note include a suggestion that intercourse with Asian States favoured the process of secularization of the Law of Nations, comments on the real nature of the doctrine of *jihad* and the view that Asian practice influenced the formation of certain rules of the classical Law of Nations.

Professor Röling has been a judge in the Special Court of Cassation in the Netherlands and a member of the International Military Tribunal for the Far East, and by the exercise of these capacities is particularly qualified to lecture on 'The Law of War and the National Jurisdiction since 1945'. The chief source for his material consists in the judgments of the Netherlands Special Court of Cassation which are compared with the views of other war-crimes tribunals. The intention is to consider the impact of the trials on the contents of the law of war and the result is an assessment of the war-crimes trials which is neither too cynical nor too optimistic. There is considerable reference to the factual background to the trials and to national policies. Thus Netherlands courts were apt to uphold the legality of acts of the resistance against a ruthless occupant. But at the same time the comment on technical points is particularly shrewd (see the discussions of military necessity, reprisals and hostages, pp. 382-9 and 417-28). The treatment of the question of 'superior orders' (pp. 372-7) is attractive in that it reveals clearly that this unhelpful category masks the more precise problems of mistake of law and duress. In his concluding remarks he emphasizes the need to revise the laws of war and stresses the significance of the recognition of the criminality of aggressive war, the establishment of the crime against peace, in the atomic era. An excellent bibliography is provided.

In lectures on 'Le Droit des relations entre les organisations internationales' Professor Dupuy has examined the legal aspects of the system or, more correctly, the aggregation, of international organizations in a reasonably practical manner. Theoretical observations provoked by the subject-matter are no doubt pardonable, since the relation between the legal forum based on orthodox norms and the 'functional

independence' of international organizations is of great interest. The second volume finishes with a short specialist course by Dr. Zimmermann: 'Les Problèmes fiscaux du marché commun'.

The bulk of the third volume (pp. 5-254) is occupied by a general course on 'Principes de droit international public' by the distinguished Danish jurist Professor Max Sørensen. Whether or not one agrees with all the views expressed by him, this appears to be the best exposition of the modern law of peace to have appeared for many years. Obviously there is selection of topics but all the more vital subjects are given consideration and the method of treatment achieves a nice blend of opinion and a realistic assessment of modern practice, the results of recent conferences, the decisions of courts and other key sources. Professor Sørensen has set himself the task of approaching the sources relating to each topic in the manner of an international court and has achieved a high standard of exposition. A large part of his course (pp. 5-108) is devoted to sources, but from the point of view of technique this system of priorities is probably justifiable. Separate chapters deal with general principles of law, custom, treaties, multilateral treaties and the resolutions of international organs. Reading his chapters one is tempted to ask whether some synthesis of the various 'sources' is possible. Apart from general principles of law, the basic question is whether there is a valid consent by a particular State to a particular rule. Thus the persistent objector in the sphere of custom and the type of estoppel occurring in the Ihlen declaration and certain votes in international organizations raise the question of consent but neither of these two problems fits neatly, or at all, into the categories 'custom' or 'treaty' (at pp. 55-58 and 67, Sørensen considers the estoppel problem in terms of the conclusion of treaties). General principles of law stand outside this synthesis (assuming it is acceptable) but these relate to subjects such as the law of evidence which are unlikely to be the objects of the usual expressions of State practice and one may doubt whether counsel appearing before the International Court rely upon them with any degree of confidence. However, as a judicial handmaiden they are invaluable in matters of evidence, procedure, the law of damages and the elemental concepts of responsibility. A basic question not considered by Sørensen, but related to the phenomenon of the persistent objector, is whether States may contract out of *any* rule. It is very probable that the acquisition and maintenance of statehood involves the acceptance of certain fundamental duties and the exercise of certain rights. In effect there is a category of 'fundamental principles of international law' of which the duty not to resort to force except in self-defence is the prime example.

Turning from the problems of the sources Sørensen examines the relation of international law to national law and concludes that the dualist conception corresponds the more closely to realities. The chapter on subjects of the law contains comment on familiar topics which blends logic and reality. Thus recognition is regarded as neither completely declaratory nor completely constitutive and the individual is regarded as a subject of the law only within certain strictly defined limits, the State alone being responsible for breaches of the law apart from the cases of war crimes and genocide. The discussions of territorial sovereignty, sovereign immunity, expropriation and nationalization are interesting and up to date. In his treatment of nationality there is an acceptance of the logic of the *Nottebohm* case (Second Phase), *I.C.J. Reports*, 1955, p. 4. The chapter on the responsibility of States contains some interesting suggestions as to the application of the risk-principle when damage is caused by lawful acts. The final chapter is entitled 'Force and the Law' and is a concise survey of the existing legal limitations on resort to force by States. In his view Article 51 of the Charter of the

United Nations is not a reservation, but a qualification, of the customary law relating to self-defence. The chapter is completed with an attempt to fit the *Corfu Channel* case (*Merits*), *I.C.J. Reports*, 1949, p. 4, into the modern legal régime on the use of force. In regard to the passage of 22 October 1946 Sørensen's explanation of the Court's findings seems obscure. The fact that the Court supported the forcible affirmation of rights which at the time of acting were *putative* seems inescapable. The most charitable explanation of its attitude is probably that its precise function was to determine delictual responsibility taking all the circumstances into account. One feels that the hidden premiss was the apparently ruthless measures taken against the trespassers. At the very end of the chapter the general position is further obscured by a reservation of a right of intervention to protect nationals, a right which can only be reconciled with the Charter by a somewhat controversial dialectic.

Professor Nial, a Swedish expert, *inter alia*, in company law and the conflict of laws, considers 'Selected Problems of Private International Law', chiefly in the law of sale and bankruptcy. In a short chapter (pp. 311-22) the question of the diplomatic protection of limited companies in international law is discussed and some interesting points emerge in regard to difficulties arising from multi-national ownership of shares. There follows the posthumous publication of a very short study by Professor Vallindas entitled 'La Structure de la règle de conflit'. This is a theoretical essay containing generalizations relating to the basic concepts of conflict of laws and, to be properly appreciated, it must be read in the light of his thesis on the concept of an international legal science (see his article in *The International and Comparative Law Quarterly*, 8 (1959), p. 613). He considered the conflict of laws to be the most suitable instrument for the gradual unification of various legal systems and the integration of national concepts. The third volume of the series is completed by Professor Monaco's contribution on 'Les Assurances en droit international' which provides a very useful survey of the more important aspects of this relatively unfamiliar subject, including insurance in the fields of international transport and the development of nuclear power.

IAN BROWNLIE

XXth Century Comparative Law and Conflicts of Law: Legal Essays in Honor of Hessel E. Yntema. Leyden: A. W. Sijthoff. 1961. xv + 547 pp.

On the occasion of the seventieth birthday of Hessel Yntema, thirty-nine of his many friends and admirers have combined to present him with a volume of studies, the width and the depth of which assure it a permanent place in legal literature. Readers of this *Year Book*, whose interests are concentrated on public and private international law, will not require a detailed analysis of those contributions which deal with general and special problems of comparative law and with various aspects of national and supra-national constitutional law. They should note, however, that these contributions all add, in one way or another, to the better comprehension of the general principles of law applied by States or of the existing minimum standards. In particular, attention must be drawn to the studies by Schlesinger on the common core of legal systems; of Valladão on private international law, uniform law and comparative law; of Doelle on the interpretation of statutes and treaties framed in several languages; and of E. Stein on the Convention on European elections. Here it is only possible to examine in some detail the articles on topics of private international law. Batiffol examines the possible

trends of continental private international law away from the *lex patriae* towards the law of the domicile with special regard to capacity to marry, divorce, guardianship, capacity to contract and maintenance obligations. He concludes cautiously that the death-knell has not yet sounded for the principle of nationality, but his final observation that, if Spanish spouses desire a divorce in France, they should first become naturalized in France, may be practical rather than a theoretical *prise de position*. Graveson, under the title of 'Judicial Justice as a Contemporary Basis of the English Conflict of Laws', gives a lively account of *Starkowski v. A.G., National Bank of Greece and Athens v. Metliss* and *Adams v. National Bank of Greece and Athens* to illustrate the creative process of English courts when confronted with a new problem, namely conflicts of law in time. While this conclusion is formally unassailable¹ it seems that, in the present state of our knowledge—see Roubier, *Le Droit transitoire* (2nd ed., 1960); Wengler, *Zeitschrift für ausländisches und internationales Privatrecht*, 23 (1958), p. 535 and this reviewer in *Cambridge Law Journal* (1960), p. 169 and (1961), p. 123—it is possible to rely, in this particular instance, on technical rules rather than on ill-defined considerations of justice and equity. Nadelmann, in a very well-documented study, examines the claims of the courts of the plaintiff's nationality and of the *situs* of property, to exercise jurisdiction. He shows that, while garnishee proceedings are universally sufficient to found jurisdiction (*forum arresti*), the general jurisdiction based on the mere presence of property is limited to Germany, Austria and Japan and has failed to obtain recognition elsewhere. The general jurisdiction based on the nationality of the plaintiff, as embodied in Article 14 of the French Civil Code, was originally intended to apply only if the defendant was present in France, but the latter requirement was omitted from the final draft. This omission cannot be explained by reference to the legislative materials. It may be suggested, however, that since the presence of the defendant may have been thought to confer jurisdiction in any event, the drafting committee may have regarded this requirement as redundant. This article forms a useful counterpart to Wortley's essay in *Ius et Lex* (1959), p. 347. Three articles are concerned with general principles. Moffatt Hancock discusses what he calls the classificatory, the functional and the result-selective approach; Ehrenzweig deals more or less with the same problems under the head of Characterization, while von Mehren looks at *renvoi* as a policy-minded American lawyer. This is not the place to take issue on fundamental problems. It is understandable that excessive doctrinal refinement which opens no path to salvation may revert to simple fundamentalism, but it may be questioned whether the *impasse* is really such that it is necessary to resurrect doctrines propounded 120 years ago by Wächter—as Ehrenzweig does—or to push revivalism even further and to recommend a modern form of statist doctrine—as Hancock seems to suggest. Perhaps the fault is to be found in a wrong analysis of modern tendencies. This reviewer has held for a long time the opinion, which has since been reproduced rather cursorily by Webb and Brown, *A Casebook on the Conflict of Laws* (1960), pp. 37–38, that conflict rules, in their operative facts do *not* rely on abstract sets of fact, but employ either categories drawn from local law which may or may not have a strictly technical meaning, or categories which are peculiar to private international law. This reviewer also believes that foreign law is not introduced into the case for the first time as the result of an act of characterization. Instead it appears in the statement of claim or in the defence, in which the plaintiff or the defendant relies on some legal system to support his claim or his defence. The process of characterization consists in the integration of the claim, presented in the light of some legal system, in the conflict rules of the *lex fori* by way

¹ See also Mann, this *Year Book*, 31 (1954), at p. 232.

of interpreting the former in terms of the latter, which are expressed in terms of that system or of broader concepts peculiar to private international law. The result is that one of several possible conflict rules of the *forum* applies, which may or may not refer to the legal system on which the claim (or the defence) is based. If it does so refer, all that remains is the proof of the foreign rule relied upon. If it does not, the claim either fails or must be decided in accordance with the *lex fori*. What does *not* happen is a process of secondary characterization once the law applicable has been found. The reason is that, according to this view, a right derived from foreign law is pleaded, and not a legal system as a whole. For the same reason, *renvoi* is a practical problem of pleading and evidence which can arise only if one party pleads a right derived from one system of laws, while the other party relies on that same legal system, including its conflict rules which lead to another legal system. Here the court must decide between conflicting evidence. If it is correct that the *forum* applies foreign law as the foreign court would have applied it in the particular circumstances of the case, i.e. that the problem is to ascertain a hypothetical decision of the foreign court on the same facts which are before the *forum* and involve a foreign element, and not a decision of the foreign court on hypothetical facts which do not involve a foreign element, it is evident that *renvoi* must be accepted in principle, and that it is a matter of policy for the *lex fori* when to exclude it, but not when to admit it. The remaining studies, by Cavers dealing with the chapter on contracts in the second Restatement, by Reese on agency, by Derenberg on trade-marks and good will and by Kronstein on Conflicts between Anti-trust Legislations, touch upon important aspects of private international law and offer some constructive solutions, while Hidebumi Egawa provides useful information about the little-known law of divorce of foreigners in Japan.

K. LIPSTEIN

Fontes Juris Gentium, Series A, Sectio 1, Tomus 5. By R. BERNHARDT and W. K. GECK. Published under the auspices of the Max-Planck Institute. Cologne: Carl Heymans Verlag, K.G., 1961. 663 pp. DM. 118.

The first three volumes of Series A, Sectio 1, of this well-known series of digests of international law material were devoted to the jurisprudence of the Permanent Court of International Justice and of the tribunals established under the Permanent Court of Arbitration covering the decisions of these tribunals up to the year 1934. Tomus 4, which is still in preparation, will cover the later decisions of the Permanent Court of International Justice, and the present volume continues the series with a digest of the decisions and opinions of the new Court from its inception in 1947 to the end of 1958.

The system adopted in the present volume conforms closely to that of the former volumes. The first part covers substantive international law and is divided into twelve sections, one of which is devoted to the United Nations and another to international organizations in general. The second part covers international jurisdiction and procedure, with special reference to the International Court of Justice itself, and is divided into six sections. Thirty cases in all are digested, and where an excerpt is of interest in more than one connexion it is printed in full in each section to which it is relevant. The bulk of the excerpts are, of course, from pronouncements of the Court as a whole, that is, from the decisions and opinions endorsed by the majority. A discreet selection is, however, also made from dissenting and separate opinions, the excerpts from these being printed in a slightly smaller type. As in the earlier volumes, every excerpt is

printed in both English and French on opposite pages bearing the same number, and there are 592 pages in each language. After these 1184 pages of excerpts there are 71 further pages providing (1) a list of the judges of the Court, (2) an index of the excerpts by reference to the cases, and (3) a general subject index. The whole volume of slightly over 1,250 pages is formidable in size and a little cumbersome for everyday use. Here and there an extra excerpt or slightly different arrangement might be suggested. But in general the volume has been prepared with the same thoroughness and scholarship as the previous volumes and is to be welcomed as providing us with a comprehensive guide to the jurisprudence of the first eleven years of the new Court.

HUMPHREY WALDOCK

Intervention. By ISIDRO FABELA. Publications de la *Revue générale de droit international public*, Nouvelle série N°. 2. Paris: Éditions A. Pedone, 1961. 236 pp. No price stated.

The author, a Judge of the International Court from 1946 to 1952, is especially well known for his writings on neutrality and on the Monroe and Drago doctrines. This volume is an extension of a work on intervention recently published in Spanish by the University of Mexico Press and also contains an elaboration of some material that had earlier appeared in various Latin American reviews and periodicals. Dr. Fabela's object is to explore the gradual, yet profound, transformation which he believes to have come about in recent years over the concept of intervention and the corollary concept of non-intervention. He attempts to achieve this object by means of an examination of the development of juristic and political doctrine and opinion during the past four centuries on the nature of intervention in relation to the growing internal autonomy and external independence of sovereign States. In reality, the book centres upon the historical and contemporary implications of the doctrine of intervention for the South American republics.

After a very slight investigation of the concept in ancient times, the author devotes the first section of his book to an investigation of European juristic opinion and State practice (pp. 13 et seq.). His survey is far from complete and is often confusingly allusive. The views of Vitoria, Suarez and Grotius are not adequately examined and there is no mention at all of the important discussion by Gentili in his *De Jure Belli* of 1598 of the principle of 'humanitarian intervention'—a principle that was to have the greatest significance in the State practice of the nineteenth century. The contributions of Christian Wolff to the debate on non-intervention and the highly personal ideas of Vattel on international (or 'collective') intervention are not discussed. On a number of occasions the author considerably over-simplifies the views of certain jurists; for example, the forms of 'preventive' and 'justifiable' intervention outlined by, *inter alia*, Hall, Lawrence, Oppenheim and Brierly seem to be interpreted merely as affording a convenient pretext for unilateral and arbitrary meddling, interference or aggression by the Great Powers. Of the many European writers mentioned, only the little-read Italian, Carnazza Amary, an early advocate of non-intervention, finds much favour in the eyes of the author (pp. 32–34). Nevertheless, Dr. Fabela's refutation of the views of Rougier, Scelle and Sibert (pp. 35–41, 49–51 and 65–67) is well argued and persuasive, as is his scathing condemnation of the League's gradual abandonment of its collective security machinery in face of the Manchukuo, Abyssinian and Spanish crises. It may be recalled that, at this time, the author was the permanent delegate of Mexico at the League

Assembly and was prominent in denouncing the interpretation of non-intervention implicit in British and French policies.

The survey given of North American juristic and political opinion would have been improved, in the present reviewer's opinion, by a more rigorous analysis of the influential views of Stowell and Hackworth and by a more detailed treatment of the impact upon traditional U.S. interventionist policies of the 'good neighbour' programme introduced by Franklin Roosevelt. Dr. Fabela is indeed generous in his praise of Roosevelt but concludes that, in fact, the anti-Pan-American attitude of the U.S. was not substantially changed. This attitude he styles, 'une ligne de conduite erronée, maladroite, agressive, injuste et immorale' (p. 89). The strength of his feeling, here as elsewhere, adversely affects the balance and perspective of his text; one must add that it also results in confused presentation of his material. Frequent political excursions interrupt his survey of doctrinal developments to such an extent that the reader loses sight of the object of the exposition. A further criticism must be made at this point. There are throughout the text scattered references to international incidents as illustrative of imperialist or economic intervention (e.g., to the *casus belli* between Mexico and the U.S. over the *Victoriano Huerta* affair of 1914, to the *Bryan-Chamorro Pact* of the same year between Nicaragua and the U.S., and to the U.S. interventions in Haiti between 1929 and 1930), but these incidents are nowhere analysed in detail in any one place, and the absence of an index or of cross-references makes an assessment of the author's final view particularly difficult. Probably the most interesting part of this section of the book to most international lawyers will be the comparison, viewed from the Latin American standpoint, of the policies pursued by Secretaries of State Cordell Hull and Foster Dulles. The latter's intervention in 1954 in support of the régime of Castillo Armas in Guatemala is viewed by Dr. Fabela as a classic illustration of arbitrary interference against the will of the people of the State concerned and contrary to the terms of the Charter of the Organization of American States.

The first section of the book is concluded (pp. 98-126) with an *aperçu* of the views of leading Latin American writers. The author's outline of the views of Calvo, Drago and Lleras Camargo is of especial value and explains much of the real meaning of the admission of the principle of non-intervention into the Declaration signed at the Pan-American Conference of Montevideo in 1933. Much of the material here is not easily accessible elsewhere but again the presentation is marred by a lack of citation of sources and by an absence of cross-reference.

In the second section of the book (pp. 127-202) Dr. Fabela gives a critical account of the doctrine of intervention in relation to the series of Pan-American Conferences from 1826 up to 1954. The text is here much more lucid and less subject to diffuseness; this is because the theme of Latin American autonomy is uppermost in the author's mind. The origins of a regional concept of collective intervention in the Treaty of Panama of 1826, the growing upsurge of Latin American nationalism apparent at the Washington Conference of 1889, and the final examination of the juridical nature of intervention at the Havana Conference of 1928 are seen as logical steps forward to the enshrinement of the principle of non-intervention in the Montevideo Declaration of 1933. Dr. Fabela then proceeds to an investigation of more recent events (pp. 162 et seq.) and interprets the Lima Declaration of 1938 and the Bogota Pact of 1948 as the high water marks of the Pan-American movement. His personal connexion, through his public duties, with many of the events described adds greatly to the vividness and authority of his text, and most international lawyers would agree with his claim that Articles 15-18 of the Bogota Pact were designed finally and irrevocably to mark, for

the American hemisphere, the renunciation of all the various forms of political and economic pressure which have come collectively to be called by the name of intervention. His view of events since Bogota is that economic intervention has increased and that this increase is most clearly reflected in the proceedings and the outcome of the Caracas Conference of 1954. The debates surrounding the controversial Declaration of Solidarity of 1954 against the incursions of Communism into Latin America are thoroughly analysed, and Dr. Fabela has no doubt but that the Declaration, largely the work of Mr. Dulles, was achieved at the expense of the principle of non-intervention and of the bases of co-operation established at Bogota. This argument is of especial interest at the present time, since the events at the Punta del Este meeting, in January 1962, which led up to the expulsion of Cuba from the Organization of American States, have aroused fears similar to those expressed by the author.

The book ends with a short survey of the hearings and the Judgment of the International Court in the *Corfu Channel* case (pp. 213 et seq.), a case which the author regards as of especial significance for the Latin American countries. This is an interesting and a temperate chapter but it adds little to the already voluminous literature on the case or to the author's opinions as expressed at the time of the findings. Dr. Fabela's broad conclusions are, firstly, that both unilateral and regional intervention is contrary to international law. Collective measures of an interventionist nature may only be taken by the International Organization. Secondly, he believes that the U.S. should reconsider, in the light of its duty to the world community and to the American continent, the nature of its present policies in Latin America. Both conclusions lead to the unequivocal acceptance of non-intervention as a legal principle of the first importance.

There is a selective bibliography with much useful material on the Latin American writers but with no standard or consistent form of citation. A similar criticism must be made of the footnotes, which, although wide-ranging, are very often unhelpful to the reader who desires to examine more closely the events or views described in the text. As a result the book is of limited value as a work of reference. There are a number of misprints and some well-known names are surprisingly misspelt (e.g. Pufendorf, Castlereagh, John Bassett Moore, Sumner Welles). This is a provocative and timely book but, through faults of method and presentation, it does not entirely achieve its objective.

K. R. SIMMONDS

La Capacité de l'Organisation des Nations Unies de conclure des traités. By BADR KASME. Paris: Bibliothèque de droit international (R. Pichon et R. Durand-Anzias), 1960. 214 pp.

The recent cease-fire agreement concluded by the United Nations in Katanga illustrates in a dramatic form the practice and difficulties implicit in the treaty-making power of the United Nations. Dr. Kasme's book contains a thorough and most interesting examination of this practice, and presents a striking picture of the manner in which the power of the United Nations to conclude treaties has grown and developed in response to new situations and exigencies.

The first chapter is primarily theoretical and concerns the correlation between international personality and the capacity to conclude treaties. Dr. Kasme submits that the former does not necessarily include the latter. He then goes on to state that the capacity to conclude treaties is in itself conclusive proof of the existence of international

personality. However, the basis for such an assertion is not made clear and would involve a more incisive analysis of the concept of international personality than is contained in this chapter.

The following five chapters are principally concerned with the actual practice of the United Nations in the conclusion of treaties and contain a great deal of useful and stimulating information. Dr. Kasme examines in a painstaking and thorough manner the extent of the treaty-making power of the United Nations, the internal and external constitutionality of such treaties and their nature, form and classification. The last chapter, concerning the competence of the various organs, and more particularly the General Assembly and the Secretary-General, to conclude treaties, is especially valuable, although it is rather surprising that neither here, nor in any other part of the book, is the question of ratification extensively discussed. The conclusion is possibly the weakest part of the book; its two and a half pages do less than justice to the ideas contained in the previous six chapters. However, as a whole, the book is to be welcomed as a most useful contribution to the growing literature on the impact of international organizations on international law.

J. F. McMAHON

Les Techniques de revision des conventions internationales. By JEAN LECA. Paris: Pichon et Durand-Auzias, 1961. 330 pp. 38 NF.

This is an interesting attempt to deal with one of the most controversial aspects of the law of treaties; it is not, of course, the first attempt, but the developments in State practice since the Second World War, especially in relation to international organizations, has made a re-examination of the problems in the light of the recent developments a most necessary undertaking.

The work is in three parts. The first deals with situations where the treaty itself is, directly or indirectly, the legal basis for the revision. The second deals with revision via a subsequent treaty; and the third with revision via the principles of general international law in cases of non-usage, violation by another party, necessity, and *rebus sic stantibus*.

In the first part it is, obviously, the cases of revision when the revision is not brought about by formal amendment which cause the difficulty. Nowhere is this more apparent than in the case of those multilateral treaties which form the constitutional texts of intergovernmental organizations and when *ad hoc* revision or amendment occurs. The author cites in some detail the cases of the United States reservation of a right to withdraw from W.H.O., of the establishment of the United Nations Administrative Tribunal, of the extension of the functions of the Assembly of the Council of Europe, and of the development of the powers of the High Authority of the European Coal and Steel Community; he merely mentions the case of the resolution on Uniting for Peace as a well-mooted one. The author clearly accepts that, in these cases, the twofold character of the treaty (namely, as a source of rights and duties and as a constitution for an organization) gives it a dynamic character which necessarily involves change and revision. Yet, given that a formal procedure for amendment exists, are there any limits to the degree and kind of change which can occur informally and legally? Or, under what conditions do changes contested by certain members become part of the constitution of the organization? These are the questions which M. Leca does not really answer.

In the second part, dealing with revision by subsequent treaty, the two different cases of identity between the parties and non-identity are clearly distinguished. The real difficulty is the latter case, and M. Leca is not disposed to accept the view advanced by the late Sir Hersch Lauterpacht in his report on treaties to the International Law Commission in 1953, namely that the subsequent treaty is to the extent of any incompatibility a nullity, at least when there is damage to the interests of the earlier contracting parties. His own view is that, when the second treaty involves no new parties:

‘Si un conflit oppose directement les deux séries d’obligations, la première bénéficiera d’une priorité d’exécution sans pour cela annuler la seconde. . . . En revanche, nous ne pensons pas qu’une nette majorité de parties puisse modifier le traité *erga omnes* hormis dans certains cas exceptionnels’ (p. 243).

The notion of ‘priority of execution’, applied to inconsistent obligations *inter se*, certainly seems strange; it is rendered rather more palatable by the concession that, where new, third parties are involved in the second treaty an obligation to make reparation for any failure to execute the first arises. The exceptional case of a piece of ‘international legislation’, introducing a ‘nouvel ordre juridique’, is recognized as standing apart from these rules.

In the third part M. Leca accepts, basically, the statement in Sir Gerald Fitzmaurice’s second report to the International Law Commission (Art. 19) of the circumstances in which one party is entitled to repudiate a treaty on the ground of non-fulfilment by the other. He also enters a strong plea for the retention of the doctrine of necessity as a ground for repudiation, a plea which this reviewer could not accept in the absence of a rule of compulsory judicial settlement of the issue whether the plea was justified. Lastly, he deals with the doctrine *clausula rebus sic stantibus*. This reviewer would share M. Leca’s view that, contrary to the view of Sir Gerald, the doctrine can apply to a treaty which contains a clause specifying its duration. Again, ideally, one would like to see this plea of *rebus sic stantibus* linked with an obligation to accept judicial settlement, but the chances of the principle of compulsory settlement being accepted by the International Law Commission, even within these narrow limits, are very small indeed. One has to bear in mind the practical difficulties in drafting a code within the International Law Commission; that being said, it may also be confidently said that M. Leca’s work should be of considerable assistance to the International Law Commission, as well as being a contribution in its own right to the literature in this field.

D. W. BOWETT

The Position of the Individual in International Law according to Grotius and Vattel. By PETER P. REMEC. The Hague: Martinus Nijhoff, 1960. xii+260 pp. D.Fl. 18.

This monograph is concerned with problems related to the ultimate foundations and validity of international law and especially with the position accorded in the community of nations to the individual human being. Dr. Remec believes that, in view of the tendency of modern jurisprudence to move away from positivist concepts, it is important to know whether the classical writers can provide alternative materials for the construction of a modern theory of international law. His examination of certain passages in the principal treatises of Grotius (*De Jure Belli ac Pacis*, 1625) and Vattel (*Le Droit des gens*, 1758), in which the legal status of the individual with respect to both municipal and international law is discussed, leads him on to the consideration of how

far, and to what extent, modern doctrinal difficulties may be attributable to ideas expressed or developed by those two writers.

The author gives a scholarly and well-documented account of both sets of texts, although it is a matter for regret that references are given only to the reproductions and translations of the original texts published in the 'Classics of International Law' series. He brings out very clearly the insistence of Grotius upon balancing the requirements of man, the State and the *societas gentium*, but, in the view of the present reviewer, does not succeed so well in the admittedly more difficult task of analysing the moral personality of the State as seen by Vattel. The weaknesses of Vattel's style and reasoning have often been commented upon and compared unfavourably with the influence his work had upon the development of the concept of national sovereignty in the following century. Yet he was, in some degree, a man of both democratic and humanitarian principles; in this book Dr. Remec stresses Vattel's lack of originality and the ambiguity of many of his propositions but does not satisfactorily explain Vattel's purpose or the philosophical background to his work.

The summary evaluation of conclusions (pp. 237 et seq.) leads, not unexpectedly, to the author's approval of the law of nature, as expressed by Grotius, serving as 'the basis of a true universal order embracing all human relations and binding each man in whatever capacity he is acting' and to an equally forthright rejection of the Vattelian construction of the law of nature, of the 'natural and necessary law of nations', and of the voluntary law of nations, as the 'greatest obstacle to a modern reconstruction of the law of nations'. The book is a welcome addition to the sparse modern literature upon the history and sources of international law; Dr. Remec is to be congratulated upon a most persuasive demonstration of the relevance of the study of the classical texts in the consideration of problems concerning the international protection of rights of the individual at the present time.

K. R. SIMMONDS

The Law of International Institutions in Europe. By A. H. ROBERTSON. Manchester University Press. New York: Oceana Publications Inc. 1961. ix + 140 pp. (including a documentary appendix). 18s. 4s.

Dr. A. H. Robertson, who has done so much to familiarize the English-speaking world with the still unfamiliar universe of European political administrative and legal institutions, has made a further very useful contribution to the subject in five lectures for Manchester University. The lectures expound with Dr. Robertson's customary clarity the present position in this relatively new branch of international law and indicate some possible lines of future development. What he is primarily concerned with is what he suggests might be called international constitutional law, that is the law relating to the structure and functioning of international institutions; and it is indeed in the working out of new institutional forms that Dr. Robertson sees the most significant contribution that lawyers can make towards the building of a new Europe. If the announcement of Britain's intention to seek membership of the European Economic Community which was made between the completion of Dr. Robertson's book and the writing of this review were in fact to lead to an amalgamation of the institutions of the outer and inner European groupings the number of legal problems involved would undoubtedly give point to this remark.

Meanwhile the lectures are concerned to trace the different types of international

organization that have so far been developed and the legal principles underlying them. It has, as Dr. Robertson shows, so far been the rule that the wider the membership the less the delegation of authority away from the national Governments; and point is given to this by an exceptionally interesting analysis of the draft convention of O.E.C.D., where the susceptibilities of the U.S. Congress have had to be recognized, in the weakening of its authority compared with that of O.E.E.C. It is clear that whatever may be the case in Europe, the United States is far from accepting Dr. Robertson's view that the course of twentieth-century history is leading to a situation in which 'the concept of national sovereignty, which we have hitherto accepted as the fundamental premise of international law is out of date'.

The analogy with constitutional law is further exemplified in the use made by Dr. Robertson of the notion of conventions as a method of constitutional development in international institutions. This point is illustrated by reference particularly to the Assembly of the Council of Europe. For instance, in a manner quite unforeseen in its Statute, the Consultative Assembly provides the only place in which 'members of the governments of the different countries can explain their policies and seek the support of members of parliament from all over Europe'.

In addition there is the possibility of the proliferation of functions and institutions by agreements between Members, ranging from the European Conference of Local Authorities, which looks like becoming permanent, to the European Conference on Wines and Spirits.

The final lectures deal with human rights and the work of the Commission and Court, and their function as pace-setters for other regions of the globe. Dr. Robertson particularly stresses the importance of the *Lawless* case as a step 'in establishing the status of the individual in international law'. But one must not exaggerate. He points out that the sanction for the Court's judgment is only the power of suspending the offending State possessed by the Council of Ministers under Article 8 of the Statute. If Dr. Robertson is right in stressing Article 3 of the Statute and regarding respect for the rule of law and human rights a condition of membership of the Council of Europe, it would appear that at least one and perhaps more than one member is not fulfilling this condition in a way which would seem improper if domestic law were involved. Nevertheless, given the novelty of the whole concept, a qualified optimism is perhaps in order. And Dr. Robertson's clear devotion to the European idea is never pushed to the point of confusing ideal with reality.

MAX BELOFF

Field Administration in the United Nations System. By WALTER R. SHARP. London: Stevens & Sons Ltd., 1961. xiv+570 pp. £3. 3s.

The United Nations inherited from the League a commitment, not so much to attain precise objectives as to satisfy certain large aspirations, in the domain of economic and social betterment. In recent years an increasing effort has been made to fulfil that commitment through the provision of technical assistance under United Nations auspices to underdeveloped countries. Though the United Nations is only one of the various sources of aid (and in itself only an indirect one), an interest obviously centres on the means which it has adopted in order to ensure that the maximum benefit is obtained from the assistance. Not only does the Organization symbolize the feeling that the provision of world-wide economic sufficiency is a matter of common international responsibility, but the global span of its operations, the number of agencies

involved and the multinational character of its staff all lend special difficulty and fascination to the task. With so many 'cross-cultural' influences at work, can an international administration ever operate as efficiently as a good national one? To help answer this question Dr. Sharp examines the over-all organizational pattern which the United Nations has followed, particularly in its administration of the Expanded Programme of Technical Assistance over the past ten years. Basing himself on an extensive series of interviews with national and international officials, and on a careful study of the available documentation, the author analyses the various forms of local administration which have emerged, as well as the planning machinery by which United Nations aid-programmes are prepared and co-ordinated.

In Part One Dr. Sharp examines specifically the field organization of United Nations technical assistance and the administrative arrangements which have been developed in order to assist the growing number of experts working with national ministries and local officials. As he notes, international field operations were virtually unknown under the League except in refugee and other emergency campaigns. Following the example of U.N.R.R.A., however, both the United Nations itself (including important subsidiary bodies such as U.N.I.C.E.F.) and the various specialized agencies have come to develop a network of national and regional offices. With the provision of technical assistance for specific projects the result has often been a proliferation of overlapping field activities. In order to provide some measure of co-ordination, the practice has therefore been adopted of appointing a Resident Technical Assistance Representative to the majority of host countries. Besides making arrangements with the national authorities for the full utilization of the services of technical experts, a matter usually entailing the designation of a counterpart local official, the Technical Assistance Representative must also ensure that the different United Nations bodies involved work in harmony. As for the routine liaison of United Nations field offices, Dr. Sharp notes the various informal methods which have evolved, including the local inter-agency committees which meet to consider such matters of common interest as the conditions of service of local employees, the sharing of the United Nations communications network and the application to field staff of the General and Special Conventions on Privileges and Immunities.

Relations with the host country are of central importance throughout technical assistance administration. It is to be regretted, therefore, at least by a lawyer, that the author does not present a more detailed examination of the 'revised standard agreement' between the United Nations and individual host countries regarding the conditions under which the majority of technical assistance staff now operate. This agreement, together with the model letter of introduction of the Resident Technical Assistance Representative, constitute the main instruments regulating day-to-day relations between the host Government and United Nations officials; however, as Dr. Sharp points out, numerous other agreements have also been entered into concerning either special projects or relations with various specialized agencies, the upshot occasionally being that staff working side by side do not enjoy equal privileges. Consequences of this nature, leading perhaps to delay in the importation of an expert's furniture and his even more essential car, are only some of the difficulties he may encounter. The possibility that the national ministry or associates with whom the expert is supposed to work may prove to be unenthusiastic, together with the 'cultural shock' of a foreign environment, rate even more highly in Dr. Sharp's opinion as factors discouraging available talent. Headquarters-field relations, which form the subject of Part Two, become all important in such a context, both as encouraging the expert to continue

with a long uphill task and as providing him with the necessary support services. Once more the Resident Representative has a vital part to play in ensuring that continuity is maintained during staff changes and that the expert stays within the right guide lines.

When aid-programmes for the future are being elaborated, the problem also arises of determining the degree of centralization or decentralization which is desirable in the administration of aid. Part Three, which deals with programme-planning, traces the ebb and flow of ideas between the centre and the periphery which goes into the final choice of projects. One of the difficulties is that, although the Economic and Social Council has broad powers of co-ordination, it has no true legislative powers with which to direct and superintend the activities of the specialized agencies engaged in technical assistance. The Administrative Committee on Co-ordination, the body chiefly responsible, itself consists largely of representatives of those agencies. Besides this central machinery, the United Nations regional Economic Commissions are important for the preparation of background studies and for their role as catalytic agents *vis-à-vis* important national ministries and officials. Dr. Sharp's conclusion is that in practice over-all planning orientation is largely the product of a partnership between the Economic and Social Council and the various regional and functional commissions.

On the 'country' level the matter grows more complicated; broadly, however, 'country' programmes are planned in conjunction with host country officials, under rules formulated by the Technical Assistance Board and then approved by the Technical Assistance Committee; so far as possible projects are chosen so as to assist existing national development programmes. The elaborate co-ordination involved between Governments, specialized agencies and fund-allocating bodies does not, despite all Dr. Sharp's clarity of exposition, make easy reading; the result of his clarity is to show how complex the process is. The founding of the Special Fund to develop 'pre-investment' projects has only increased the problem, and the author illustrates the advantages to be gained from a merger of the Special Fund and the Expanded Programme. The author then considers the interrelation of the United Nations programme with others, such as the United States Point Four Programme and the Colombo Plan, indicating the headquarters and field liaison which operates.

Regarding the impact of technical assistance, it is hard to find satisfactory means of gauging just how great this has been. It will be necessary to wait for a number of years, or even decades, before the success of many projects can be assessed. However, as Dr. Sharp illustrates, the work done has proceeded at the grass roots; to an extent often little realized in more industrialized countries, the United Nations, in the eyes of the underdeveloped nations, stands more for technical assistance and visiting experts than for the resolution of peace and security issues. In conclusion, therefore, the author emphasizes that the United Nations field organization is here to stay and that its importance will increase over the coming decade. Nevertheless, as he shows, the present framework has its limitations owing to an uneven course of development and the wide dispersal of programme controls. The successful transplanting of the technical assistance project into the keeping of the national Government is also an art which has yet to be fully mastered; as has been noted in various contexts, the United Nations finds it easier to get engaged in a problem than to get disengaged. Lastly, Dr. Sharp stresses the need to strengthen the authority and importance of the Resident Technical Assistant Representative, on whom so much depends.

This book is not 'legal', nor is it the manual of instruction all international officials engaged in field administration have been waiting for. However, it deals with developments of which international lawyers ought to have more knowledge than is in fact

usually the case. Moreover, the author describes the administrative problems (and successes) and sheds light on an activity of the United Nations in which many untouched legal problems reside. The original conception of the United Nations in 1945 was still that of an international conference writ large; the intervening years have seen the Organization stir and come to life throughout the world. On the level of the procurement of goods and services alone, from bulk-buying and the hiring of ships and aircraft to the drafting of commercial contracts and the employment of tens of thousands—each aspect involving numerous contacts with different countries and State agencies—the increase in legal problems has been enormous. There can be little doubt that the next ten years will see a revolution in the law concerning international organizations, an upheaval designed to encompass those developments: our thanks must therefore go to Dr. Sharp for describing so well the setting in which this legal progress will take place.

M. J. L. HARDY

Das Arbeitsrecht als Gegenstand internationaler Rechtsetzung. By GERHARD SCHNORR. München/Berlin: Verlag C. H. Beck, 1960. xiv + (with indices) 324 pp. No price stated.

This volume appears in the distinguished series of publications of the Institut für Wirtschaftsrecht of the University of Cologne and it may conveniently be read in conjunction with the standard treatise of Professor Nipperdey, the President of the Bundesarbeitsgericht, who is himself the General Editor of the series. The author of the volume under review has not set out to write either a comprehensive survey or an examination of the fundamental principles of international labour law. Instead, he has concentrated upon the concepts and source materials in those fields of activity which are developing most rapidly at the present time. He is successful not only in throwing much light upon the areas of municipal and international activity which he selects but also in bringing out very clearly the nature of the most significant problems to be faced in the struggle for the raising of labour standards. Dr. Schnorr believes that the coming decade will see municipal labour laws increasingly subjected to international standards and world regulation. Because of this, and because of the alleged inadequacy of the traditionally recognized sources of international law to explain the *rationale* of international economic law, he sets out to define in his book the content and the boundaries of a new and independent field of legal study.

Much of the book is concerned with an investigation into the jurisprudential, moral and sociological bases of labour law with respect to international and regional organizations and institutions (pp. 33 et seq., 239 et seq.). International lawyers will find of particular value the author's penetrating survey of the institutional characteristics of I.L.O. (pp. 102 et seq.) and his inquiry into the realities underlying the formal constitutional relationships between I.L.O. and its member States in matters appertaining to jurisdiction and control (pp. 166 et seq.). The present reviewer also found the author's stimulating treatment of labour standards within O.E.E.C. and the European Economic Community of great relevance to the present debate concerning the possibility of the admission of the United Kingdom to the Community (pp. 246 et seq.). Problems of discrimination on grounds of nationality and of the freedom of movement of workers are well treated, and there is an exhaustive general survey of the impact to date of the relevant provisions of the Rome Treaty upon the municipal law and practice of the 'Six'.

This is a thoughtful and scholarly book which marks a welcome departure from the usual approach of contemporary writers to this difficult and rapidly changing subject. Dr. Schnorr's plea for a search for common principles cannot go unheeded if there is to be any hope for a gradual growth of international customary law in this field. His book has a full bibliography and there is ample reference to a wide range of juristic and case-law materials in most of the countries of western Europe. The book is very well produced and a pleasure to use.

K. R. SIMMONDS

Le Statut personnel des étrangers ennemis et la Convention de Genève du 12 août 1949 relative à la protection des civils. By ROLAND SEEGER. Éditions Ringier & Cie. Zofingue, Switzerland. pp. 166. £1. 8s.

In many ways this title is misleading, for only one-third of this book is concerned with the Geneva Convention of 1949. Rather it is an historical survey of the status of enemy aliens during time of war, culminating in a study of the Civilians Convention of 1949. Although a fairly short treatise (160 pages), it is remarkably comprehensive and closely packed, with no word wasted, no argument laboured. Nor does the brevity of this readable, well-constructed work prevent a very considerable scholarship: it is well documented throughout and contains a useful bibliography.

Dr. Seeger suggests that the Government of a State may take one of four basic attitudes towards enemy aliens within its territory at the outbreak of war: the Government may allow them to remain free within its territory or to leave, as they choose; it may demand that they leave; it may insist that they stay, though placing them under no other restrictions; or it may intern them or place them under some other similar restraint. The author traces the practice of the major powers on these alternatives in the pre-1914 period and from 1914 to 1949, and concludes with an examination of the provisions of the Geneva Convention of 1949.

The author's humanitarian concern and liberal instinct are reflected clearly in these pages, where he is closely concerned with the distressingly frequent practice of mass internment, which so often has caused unwarranted hardship not only to persons in no objective sense dangerous to the security of the detaining State, but often to refugees from the oppression of the enemy State itself. The question of whether there had, prior to the Convention of 1949, developed a customary rule of law permitting mass internment is a difficult legal question, and Dr. Seeger's arguments against the proposition are well reasoned and convincing. It was to be hoped that the Geneva Convention would ensure that internment could only be ordered against individuals on specific grounds, and not against aliens *en masse*. However, although lip service is paid to this precept (Articles 38, 41), the reservation of 'national security' renders the guarantee of little effect. It remains for the detaining State to decide whether measures other than internment are sufficient for the protection of its national security; and even a moderate Finnish proposal that the words *intérêts nationaux* be replaced by *impérieuses considérations de sécurité* failed to be adopted. Nor does the Convention offer any objective criteria to aid the State in its decision: for example, it is not clear whether the fact that an enemy alien is of age and sex to carry arms constitutes a criterion for applying internment measures. Whether repatriation is permitted against the will of an enemy alien also has been left unclear and, by guiding us through the *travaux préparatoires*, Dr. Seeger shows how in this particular problem, as in others, there is a continual conflict between the principle of individual liberty and the security of the state.

Unfortunately the author does not deal with questions other than the personal status of the enemy alien—thus penalties other than internment, such as property confiscation, freezing of assets, &c., find no place in this book. In the greater part of the volume Dr. Seeger is content to compile the evidence of State practice and to recount the opinion of others, and only in the final sections on the Geneva Convention on Civilians does he allow himself to analyse, criticize and recommend. The absence of a text of the Civilian Convention as an appendix is to be regretted.

However, this book provides a valuable contribution towards a fuller understanding of the complex legal and humanitarian problems concerning the treatment of enemy aliens. It places them in historical perspective, summarizes recent State practice, and appraises those hopes for the future which lie in the Geneva Convention.

ROSALYN HIGGINS

TABLE OF CASES¹

- Abate *v.* Abate (*orse* Cauvin), 557-60
 Acciaieria Ferriere di Roma (FEREM) *c.* Haute Autorité, 336
 Acciaieria e Tubificio di Brescia *c.* Haute Autorité, 336, 337
 Acquisition of Polish Nationality Case, 89
 Admission to Membership of the United Nations, 22, 73, 141-2, 143, 321-2, 333, 349
 Admissions Case: *see* Admission to Membership of the United Nations
 Aerial Incident (El Al) Case (Israel *v.* Bulgaria), 3, 5, 37, 49, 50-51, 142-3
 Ahmed Emin Bey *v.* Great Britain, 311
 Alberto Campolongo *c.* Haute Autorité, 347
 Algera et autres *c.* Assemblée Commune, 331
 Ambatielos Case (Greece *v.* The United Kingdom), 57, 64
 Ambrose Light, *The*, 501-2, 503
 Anglo-Iranian Oil Co. Case, 174
 Antelope, *The*, 247
 Arbitration between Germany and Portugal, 177
 Archduke Frederick of Habsburg-Lorraine *v.* Serbian-Croatian-Slovenian State, 129-30
 Archdukes of the Habsburg-Lorraine House *v.* The Polish Treasury, 130-3
 Armitage *v.* Attorney-General, 557-60
 Aron Kahane successeur *v.* Francesco Parisi and the Austrian State, 133, 149
 Associazione Industrie Siderurgiche Italiane (ASSIDER) *c.* Haute Autorité, 328, 330, 334, 336, 337
 Asya, *The* (Molván *v.* A.G., Palestine), 499
 Asylum Case (Columbia *v.* Peru), 143
 Athos, *The*, 252
 Bacharach Case, 80, 144
 Baja California, *The*, 552, 553
 Barbara Erzbergbau A.G. et autres *c.* Haute Autorité, 328, 331, 335
 Behring Sea Arbitration, 248
 Binon *v.* German State and S.A. des Glaces de Reisholz . . . , 145-6
 Bochumer Verein für Gusstahlfabrikation A.G., Niederrheinische Hütte A.G. . . . *c.* Haute Autorité, 347
 British Property in Spanish Morocco, 102-3
 Cacchi Valentino *v.* Austrian State, 122
 Carnelli Case, 144
 Caroline, *The*, 220, 225-6, 228, 229, 233, 254, 281, 298, 299, 302
 Castioni Case, 504, 505
 Certain Danzig Legislative Decrees, 73
 Certain Norwegian Loans Case: *see* Norwegian Loans Case
 Chambre syndicale de la sidérurgie de l'est de la France . . . *c.* Haute Autorité, 328
 Chambre syndicale de la sidérurgie française *c.* Haute Autorité, 337, 338
 Chammas *v.* Ministry of the Interior, 137-8
 Chemidlin *v.* International Bureau of Weights and Measures, 448
 Chervet *v.* Schwobthaler, 89
 Chorzów Factory Case, 38, 164, 169, 170, 171
 Chourreau *v.* United States, 110-11
 Christian Damson (United States) *v.* Germany, 147
 Christina, *The*, 552
 Church *v.* Hubbard, 251
 Cie du Pegamöid *v.* Preußische Staatsbank and German State, 89
 Clorinaldo Devoto *v.* Austrian State, 134-5
 Compagnie des hauts fourneaux et fonderies de Givors . . . *c.* Haute Autorité, 348
 Company General of Orinoco Case, 173
 Competence of the General Assembly for the Admission of a State to the United Nations: *see* Admission to Membership of the United Nations
 Competence of the I.L.O. to Regulate the Personal Work of the Employer, 106-7, 322, 340
 Competence of the I.L.O. with respect to Agricultural Labour, 92-93, 331, 340, 343, 347
 Comptoirs de vente du charbon de la Ruhr . . . *c.* Haute Autorité de la C.E.C.A., 326
 Consorts Michaux *v.* German State, 141
 Constitution of the Maritime Safety Committee of I.M.C.O., 3, 106
 Cook Case (United States *v.* Mexico), 170
 Corbett *v.* Corbett, 559
 Corfu Channel Case, 223-4, 233, 244, 250, 261, 266, 298-9, 313
 Creole, *The*, 500, 503
 Crimdon, *The*, 553

¹ The figures in heavier type indicate the pages on which the cases are reviewed.

- De Bernonville, *In re*, 504
 De Gezamenlijke Steenkolenmijnen in Limburg *c.* Haute Autorité, 328, 336
 De Paoli *v.* Bulgarian State, 135
 De Reneville *v.* De Reneville, 559
 De Sabla Case, 170
 Delagoa Bay Railway Case, 172
 Deutsch-amerikanische Petroleum Gesellschaft Oil Tankers Case, 90
 Deutsche Gasglühlicht AG. and Osram GmbH. *v.* International General Co. Inc., New York, 85
 Diaz Diaz *v.* United Nations Economic Commission for Latin America, 448
 Dickinson *v.* Del Solar, 549
Dictator, The, 553
 Dineke Algera, M. Giacomo Cicconardi, . . . *c.* Haute Autorité, 337
 Ditta Isidoro Hess Soc. Anon. . . , *v.* German State, 122
 Dürrenberg *v.* Polish State Treasury, 138
 Effects of Awards of Compensation made by the United Nations Administrative Tribunal, 340, 448, 455
 Engelke *v.* Musmann, 549
 Entreprises maritimes belges *v.* German State, 100
 Eva von Lachmüller, Bernard Peuvrier, Roger Ehrhardt *c.* Commission de la C.E.E., 324, 328
 Extraordinary Taxes on Property imposed in Italy, 97-98
Fahmarn, The, 551
Falke, The, 502-3
 Fédération charbonnière de Belgique *c.* Haute Autorité, 327, 328, 329, 330, 331, 332, 333, 340, 343
 Felten und Guillaume Carlswerk Eisen- und Stahl . . . *c.* Haute Autorité, 335
 Finnish Ships Case, 167
 Firme I. Nold K.G. *c.* Haute Autorité, 335, 336, 347
 Flegenheimer Case, 80, 128, 144
 Flota Maritima Browning de Cuba S.A. *v.* The *Canadian Conqueror* and other Vessels, 551-4
 Flothow Case, 95
 Friedrich Stork et Cie *c.* Haute Autorité, 326, 328, 336
 Gabriel Simon *c.* Cour de justice des Communautés Européennes, 334
 Garda Enrico *v.* German State, 122
 George Birrell Livingston and Edward Irving Findlay *v.* Willam Graaf, 112
 Genocide: *see* Reservations to the Genocide Convention
 German Clearing Office *v.* British Clearing Office, 89
 German Interests in Polish Upper Silesia Case, 173
 German Reparations under Article 260 of the Treaty of Versailles, 83-84, 88, 101, 113-14
 German Settlers in Poland Case, 173
 Germany and Portugal, Arbitration between, 177
 Godden *v.* Hales, 550
 Godman *v.* Winterton and others, 454
 Goldenberg and Son *v.* Germany, 149, 173
 Gouvernement de la république française *c.* Haute Autorité, 338, 339
 Gouvernement de la république fédérale d'Allemagne *c.* Haute Autorité, 331
 Gouvernement de la république italienne *c.* Haute Autorité, 342, 345, 347
 Gouvernement du royaume des Pays-Bas *c.* Haute Autorité, 329, 332, 334, 339, 342, 345
 Grisbardana Case (Sweden *v.* Norway), 50
 Groupement des hautes fourneaux et aciéries belges *c.* Haute Autorité, 339
 Groupement des industries sidérurgiques luxembourgeoises *c.* Haute Autorité, 330, 336, 339, 343, 346, 348
 Guardianship of Infants Case (Netherlands *v.* Sweden), 3-5, 7, 9-11, 20-21, 24-28, 36-37, 38-39, 49-50, 65-71
 Guastini Case, 113, 115
 Hamborner Bergbau Ab Friedrich Thyssen Bergbau AG. *c.* Haute Autorité, 328
 Hanga Produktions- Verwertungs- und Konsumgenossenschaft *v.* Czechoslovak State, 135
 Hirschberg and Wilczyński . . . *v.* German State, 121, 122
 Hoffman and Steinhardt Claim (United States *v.* Turkey), 170
 Illinois Central R.R. Claim, 169
 I.L.O. Administrative Tribunal (U.N.E.S.C.O.) Case, 3, 4
 I.L.O., Competence: *see* Competence of the I.L.O.
 I.M.C.O. Case, 3, 106
 Indian Prince Case, 108-9
 Indian Right of Passage Case, 3, 4, 5, 32, 143, 263
 Inland Revenue Commissioners *v.* Collico Dealings Ltd., 548
 Inter-governmental Maritime Consultative Organization Case, 3, 106
 Interhandel Case (Switzerland *v.* The United States of America): (interim measures), 3, 5, 28; (jurisdiction), 3, 5, 19, 28, 32-38 *passim*, 48, 54-56
 International Fisheries Co. Case, 165

- International Status of South-West Africa, 143, 322, 338, 349
- Interpretation of Article I of the Treaty of Ghent, 137
- Interpretation of the Convention of 1919 concerning Employment of Women during the Night, 90, 103-4, 346
- Interpretation of paragraph 4 of the Annex following Article 179 of the Treaty of Neuilly, 133, 148-9
- Interpretation of Peace Treaties with Bulgaria, Hungary and Romania: *see* Peace Treaties Case
- Interpretation of the Statute of the Memel Territory, 107-8
- Jean-E. Humblet *c.* État belge, 335, 346
- J. J. Seligman *v.* Baron W. von Liebermann, 90-91
- J. K. Poznański *v.* German State, 140-1
- Joseph Zurstrassen et Cie *v.* German State, 122
- J. Stamm and Company *v.* Baucredit Bank, 146
- Juan Ysmael & Co. Inc. *v.* Indonesian Government, 552
- Jurisdiction of the Courts of Danzig Case, 47
- Ker *v.* Illinois, 497
- Kohn and Goldschmidt *v.* Joseph Schwabacher and others, 140
- Kolczynski, *Ex parte*, 504-5
- Koninklijke Hollandsche Lloyd *v.* Dampskibsselskabet Torm A.S., 138
- Kronprins Gustaf Adolf, The*, 117-19
- Lake Lanoux Award, 109
- Landreau Claim, 169
- Lawless *v.* The Government of Ireland, 536-47
- Leader, Plunkett and Leader *v.* Dr. Karl Heye, 108
- Le Louis*, 247, 251
- Levinson *v.* Lebensversicherungs-gesellschaft, 89
- Lighthouses Case (France *v.* Greece), 174
- Losinger Case, 176
- Lotus, The*, 247, 251, 262
- Louis Stott *v.* German Government, 88-89
- Loy and Markus *v.* German State and Deutsche Ostafrikanische Bank AG., 122
- Luttges and Co. *v.* Ormiston and Glass Ltd., 112
- McCulloch *v.* Maryland, 348
- Madrazo *v.* Willes, 247
- Magellan Pirates Case, 500
- Manica Frontier Award, 94
- Mannesmann AG. et autres *c.* Haute Autorité, 327, 335
- Marshall *v.* Critico, 549
- Mary Lowell, The*, 251
- Mavrommatis Palestine Concessions Case, 76-80, 81, 87, 106, 116, 164, 521: *see also* Readaptation of the Mavrommatis . . . Concessions
- Meroni et Cie, Industrie Metallurgiche . . . *c.* Haute Autorité, 337, 344, 345, 347
- Messicano, The*, 553
- Meunier, *In re*, 504
- Miller, *In re*, 562
- Ministère public *v.* Spender, 138
- Miranda Mirossevich *c.* Haute Autorité, 337
- Missouri *v.* Holland, 349
- Mitford *v.* Mitford, 559
- Molvan *v.* AG., Palestine (*The Asya*), 499
- Moratorium Case, 348
- Moses, *In re*, 562
- Mountbatten *v.* Mountbatten, 559, 560
- Naomi Russell (United States) *v.* Mexico, 86-87, 113
- National Bank of Egypt *v.* Austro-Hungarian Bank, 149
- National Bank of Egypt *v.* German Government and Bank für Handel und Industrie, 150
- Nationality Decrees issued in Tunis and Morocco, 31-32, 102, 163, 208
- Naulilaa Case, 314
- Neer Case (United States *v.* Mexico), 180
- Negreanu et Fils *v.* Meyer et Fils, 89
- Niederstrasser *v.* Poland, 173
- Norwegian Claims Case, 170
- Norwegian Loans Case (France *v.* Norway), 3, 4, 5, 19-20, 21, 23-24, 28-30, 35, 56-65, 160, 180
- Nottebohm Case (Liechtenstein *v.* Guatemala), 3, 163
- Oral Petitions . . . : *see* South-West Africa Oral Petitions Case
- Oscar Chinn Case, 174, 176
- Ottoman Public Debt Case, 136-7
- Paalen *v.* German Empire, 91, 136
- Palachie's Case, 550
- Parlement Belge, The*, 552
- Peace Treaties Case, 42-43
- Peeters, van Haute and Duyver *v.* Trommer and Grüber, 91
- Pesaro, The*, 552
- Philipson-Stow *v.* Inland Revenue Commissioners, 560-2
- Phoenix-Rheinrohr AG. *c.* Haute Autorité, 335
- Piracy *Iure Gentium, In re*, 247
- Porto Alexandre, The*, 552, 553
- Profili *v.* International Institute of Agriculture, 448

- Provident Mutual Life Insurance Company and others (United States), *v.* Germany, 147
- R. v. Cox*, 555-7
- R. v. Dudley and Stephens*, 315
- R. v. Jennings*, 556
- R. v. Kent*, 549
- R. v. Madan*, 549-51, 554
- R. v. Martin*, 554
- R. v. Naylor*, 554-5
- R. v. O.C. Depot Battalion R.A.S.C. Colchester, Ex parte Elliott*, 497
- Rafael Aguirre *v.* United States, 85, 95-97
- Ramsay-Fairfax *v.* Ramsay-Fairfax, 558
- Readaptation of the Mavrommatis Jerusalem Concessions Case, 80, 81: *see also* Mavrommatis Palestine Concessions
- Reparation for Injuries Suffered in the Service of the United Nations, 338, 340, 343, 405, 447, 455, 457, 472, 515-26 *passim*
- Republic of Cuba *v.* Flota Maritima Browning de Cuba S.A., 551-4
- Reservations to the Genocide Convention, 213, 214
- Resolution, The*, 499
- Right of Passage over Indian Territory: *see* Indian Right of Passage Case
- Robert May Claim, 173
- Rose *v.* Himmely, 251
- Rudolf Pieter Marie Fiddlelaar *c.* Commission de la C.E.E., 324
- Ruffy-Arnell *v.* The King, 311
- Ruta *v.* Bulgarian State, 122
- Rymenans et Cie *v.* German State, 99-101
- Salvesen *v.* The Administrator of Austrian Property, 558-9
- Schlessiger Case, 135
- Scrimshire *v.* Scrimshire, 559
- Shufeldt Case, 169
- Sinclair *v.* Sinclair, 559
- Singer Sewing Machine Claim, 169
- Slovenija, The*, 252
- Società Industriale Metallurgica di Napoli (SIMET), Meroni et Cie, . . . *c.* Haute Autorité, 337, 347
- Società Mineraria e Metallurgica di Pertusola Case, 144
- Société anonyme du Charbonnage Frédéric Henri *v.* German State, 121
- Société Audiffren-Singrun *v.* Liquidation Morland, Binger et Société Atlas, 103
- Société des fonderies de Pont-à-Mousson *c.* Haute Autorité, 331, 344
- Société nouvelle des usines de Pontlieue . . . *c.* Haute Autorité, 334, 344
- Sopron-Koszeg Local Railway Co. Case, 174
- Sovereignty of Certain Frontier Land Case, 3, 4
- South-West Africa Oral Petitions Case, 3, 4, 5, 7, 21, 22-23, 39-43, 46-47, 52
- South-West Africa Voting Procedure Case, 3, 4, 5, 7, 8-9, 12-14, 17-19, 30-31, 36, 43-46, 107
- Stuttgarter Lebensversicherungsbank *v.* John Turvill, 89
- Tellini Case, 517
- Tesdorpf *v.* German State, 101
- Thomas *v.* Sorrell, 550
- Travers *v.* Holley, 558, 559, 560
- Treatment of Polish Nationals . . . in the Danzig Territory, 89
- Trustees of I. Morris *v.* W. Michaelis, 146
- Tunis and Morocco Nationality Decrees: *see* Nationality Decrees issued in Tunis and Morocco
- United States *v.* Arredondo, 119-20
- United States *v.* Cordova, 555
- United States *v.* Holmes, 315
- United States *v.* Percheman, 120
- United States, Garland Steamship Corporation and others (United States) *v.* Germany, 147
- Venezuelan Bond Case, 82
- Virginius, The*, 252, 254
- Visurgis and The Siena, The*, 138
- Voting Procedure: *see* South-West Africa Voting Procedure Case
- Weiss Biheller and Brooks Ltd. *v.* German State, 122
- Weitzenhoffer *v.* German State, 83, 121
- Wimbledon, The*, 312

INDEX

- Aggression, 193-4, 216-18, 220-4, 244-5, 257-60, 262, 264, 266-7, 277, 279-281, 288-95, 302, 306: *see also* Force, use of
- Anti-War Treaty of Non-Aggression, 1933, 193-4
- Convention for the Definition of, 1933, 216-17
- definition, 216-17, 277, 279-80, 306
- direct, 257-60, 264, 266-7
- indirect, 260, 288-95
 - propaganda, 289
 - rebels, aid to, 289-94
 - weapons, use of, illegal, 294-5
- proof of, 279, 282
- 'provisional orders' and, 295-7
- self-defence and, 220-4, 244-5, 257-60, 262, 264, 266-7, 302
- self-preservation and, 222-3
- time element, relevance of, 280-1
- United Nations Charter and, 244-5
- Aircraft over high seas, criminal jurisdiction over acts on board, 554-5
- Americas, 193-4, 199, 214-15, 221, 246, 307
- Anti-War Treaty of Non-Aggression, 1933, 193-4
- Chapultepec, Act of, 307
- Havana, Act of, 1940, 307
- Inter-American Treaty of Reciprocal Assistance, 1947, 199, 246
- Lima, Declaration of, 1938, 307
- Monroe Doctrine, 214-15
- Rights and Duties of American States, Draft Declaration, 1946, 221, 246
- Arbitral Awards, Convention on the Recognition and Enforcement of Foreign, 1958 (New York Convention), 478-9, 493-4
- Arbitration, commercial: *see* Commercial Arbitration, European Convention on Atomic Energy Commission (Euratom), 301-2, 320, 325-8: *see also* European Communities, Court of Justice of
- Blockade, land, and self-defence, 263
- Cessante ratione, cessat ipsa lex*, Lauterpacht on, 39-43
- Chapultepec, Act of, 307
- Coal and Steel Community: *see* European Communities, Court of Justice of
- Coercion, 276-9, 288: *see also* Force, use of diplomatic, 276, 278 economic, 276-7, 288 ideological, 278, 288 impermissible, 278-9, 288 permissible, 278-9
- Commercial Arbitration, European Convention on International, 1961, 478-95
 - accession to, scope, 478
 - arbitration, organization of, 481-7, 495
 - arbitral institution, permanent, submission of dispute to, 482, 484
 - 'blank' clauses, 481
 - Chambers of Commerce, Presidents of, submission of disputes to, 482, 483, 484-7
 - Plenipotentiaries, recommendations of, 495
 - procedure: *ad hoc*, 482-4; failure to indicate the form of, 482, 484
 - Special Committee, 484, 485-6
- awards, 492-4
 - enforcement, 493-4
 - Geneva Convention, 1927, and, 492-3
 - New York Convention, 1958, and, 493-494
 - reasons for, 492
 - setting aside of, 492-4
- entry into force, date of, 480-1
- foreign nationals, right of, to be designated as arbitrators, 487
- jurisdiction, pleas as to, 487-91
 - arbitrators' jurisdiction, 488-9
 - courts of law, jurisdiction of, 489-91
- law applicable to, 491-2
- legal persons, right of, to resort to arbitration, 487
- New York Convention, 1958, and 478-9, 493-4
- Plenipotentiaries, Final Act of the Special Meeting of, recommendations, 495
- purpose, 478-9
- scope, 478-80
- signatories to, 478
- United Nations Economic Commission for Europe and, 478, 486-7
- Conflict of laws: *see also* Marriage and Wills
 - private international law, Lauterpacht on the place of, 38-39
 - proper law of contract, 156-7, 161, 181-182: *see also* State contracts
- Congo, United Nations Force (O.N.U.C.) in, 390-402, 407-8, 412-15, 423-7, 428-9, 441-7: *see also* United Nations Forces
- Contracts, State: *see* State contracts

- Denial of justice, 57-58, 162, 166-8
 State contracts and, 162, 166-8
De singularis curat etiam lex, 50-51
Détournement de pouvoir, 324, 328, 334, 335, 344
 Diplomatic immunity, 549-51: *see also* Immunity
 Diplomatic Intercourse, United Nations Conference on, 1961, 550-1
 Domestic jurisdiction, Lauterpacht on, 28-35
 defence, right to raise as, 33-35
 intervention, 30-31
 province of, 28-30
 'provisional theory', 31-33
 reservation on matters of, 33-35
- Economic Commission for Europe, United Nations, 478, 486-7
 Economic Community Treaty: *see* European Economic Community Treaty
 Egypt, 280-1, 301, 303-5, 374-90, 406, 408-9, 412, 420, 423-4, 427, 428-9, 433-5, 441, 447
 Armistice Agreements, breaches of, 280-281, 301, 303-5
 U.N.E.F. and, 374-90, 406, 408-9, 412, 420, 423-4, 427, 428-49, 433-5, 441, 447: *see also* United Nations Forces
 Estoppel, 47, 322
 Euratom Community Treaty, 320, 325-8: *see also* Atomic Energy Commission and European Communities, Court of Justice of
 Europe, United Nations Economic Commission for, 478, 486-7
 European Coal and Steel Community Treaty, 320, 323, 325-6, 338, 339: *see also* European Communities, Court of Justice of
 European Commission of Human Rights: *see* Human Rights
 European Communities, Court of Justice of, 320-50
 appeal, grounds of, 324, 329
 détournement de pouvoir, 324
 incompetence, 324
 procedural requirement, violation of, 324
 Treaty, violation of, 324
 competence of the Court, 325-9, 332
 municipal law of member States and, 325-6, 332
 non-liquet and, 327
 private international law and, 326-7
 sources of law and, 327-8, 332
 détournement de pouvoir, 324, 328, 334, 335, 344
 establishment of, 323
- Euratom Community Treaty and, 320, 325-8
 competence of the Court and, 327-8
 municipal law of member States and, 325-6
 European Coal and Steel Community Treaty, 320, 323, 325-6, 338, 339
 Arts. 2-5, 338-9
 competence of the Court and, 327-8
 municipal law of member States and, 325-6
 European Economic Community Treaty, 320, 322, 325-6, 338
 Arts. 1-8, 338
 cases arising from, interpretation of, 323
 competence of the Court and, 327-8
 municipal law of member States and, 325-6
 French administrative law and, 324-5, 329
 function of the Court, 320, 323-4, 329
 international organization, interpretation of the charter of, 320-3
 discussion and consultation, 321-2
 estoppel and, 322
 judicial, 320-2
 object of, 322-3
 principles of, 323
 interpretation, 330-50
 a contrario, 347
 'Community law' and, 334-7: meaning of, 335; municipal law and, 336-7; scope of, 335
 context, interpretation by reference to, 347-8
 effective interpretation, 340-1, 343-4, 349, 350: principle of, 340-1; restrictive interpretation and, 343-4
 judicial function and, 349-50
 municipal law and, 332, 334-7
 parties, intention of, 330-1, 333
 powers of the Court, implied, and, 340-2
 principles of, 330-3, 348-50
 restrictive interpretation, 331, 343-6
 teleological interpretation, 337-40, 349: principle of, 337; Treaty provisions and, 338-40
 treaties, comparison of, 346-7
 municipal law of member States and, 325-6, 332, 334-7
 parties who may appear before, 324
 status, international, of the Court, 328-330
 task of the Court, 324-5
- European Convention for the Protection of Human Rights and Fundamental Freedoms: *see* Human Rights
 European Convention on International Commercial Arbitration, 1961: *see* Commercial Arbitration

- European Court of Human Rights: *see* Human Rights
- European Economic Community Treaty, 320, 322, 325-6, 338: *see also* European Communities, Court of Justice of
- Exhaustion of local remedies, 53-64, 166-8, 525-6
- international organizations, claims in respect of injuries, and, 525-56
- Lauterpacht on, 53-64
- admissibility, 54, 58-59
- denial of justice, 57-58
- non-exhaustion, implications of, 56, 59-64
- proof, burden of, 54, 61-62
- 'reasonable possibility', test of, 60-61
- remedy, 54, 59-61, 62-64: potential, 62-64; 'reasonable possibility', test of, 60-61; what constitutes a, 54, 59-60
- State rights, breach of, and, 54-56
- State contracts and, 166-8
- Extradition, piracy and, 500, 503-5
- Force, United Nations: *see* United Nations Forces
- Force, use of, 183-268, 269-319: legal limits of (United Nations practice), 269-319; self-defence, 183-268
- aggression and, 216-18, 220-4, 244-5, 257-60, 262, 264, 266-7, 277, 279-281, 288-95, 302, 306
- Convention for the Definition of, 1933, 216-17
- definition, 216-17, 277, 279-80, 306
- direct, 257-9, 260, 264, 266-7
- indirect, 260, 288-95: propaganda, 289; rebels, aid to, 289-94; weapons, use of, illegal, 294-5
- proof of, 279, 282
- 'provisional orders' and, 295-7
- self-defence and, 220-4, 244-5, 257-260, 262, 264, 266-7, 302
- self-preservation and, 222-3
- time element, relevance of, 280-1
- United Nations Charter and, 244-5
- Aggression, Convention for the Definition of, 1933, 216-17
- Anti-War Treaty of Non-Aggression, 1933, 193-4
- Atomic Energy Council, Report of, 1946, 301-2
- belligerent rights, 311-13
- blockade and, 263
- border raids, 301
- casus belli*, 184, 198
- Chapultepec, Act of, 407
- coercion, 276-9, 288
- diplomatic, 276, 278
- economic, 276-7, 288
- ideological, 278, 288
- impermissible, 278-9, 288
- permissible, 278-9
- Egypt, Armistice Agreements, breaches of, 280-1, 301, 303-5
- Guarantee, Treaty of, between Poland and Romania, 1926, 200
- Havana, Act of, 1940, 307
- high seas, self-defence on, 225, 247-54
- anticipatory self-defence and, 252-3
- attack, use of force to repel, 250-1
- jurisdiction over vessels and, 247-50
- piracy and, 247, 253
- right of self-defence, 225
- seizure of vessels in time of peace, 251-4
- hostile measures short of war, 188-90
- individuals, acts of, 261-2
- interests, protection of vital, 315-16
- intervention, 183-4, 187-91, 265, 308-11
- grounds of, 187-8, 191
- hostile measures short of war and, 190
- military, by invitation, 308-11
- necessity, doctrine of, 189-91
- self-preservation and, 189-91
- term, meaning and scope of, 187
- intrusion, by ships and aircraft, 260-1
- Israel, Armistice Agreements, breaches of, 280-1, 301, 303-5
- League of Nations Covenant, 196-7, 198, 200-5, 215-16, 262, 295
- Art. 10, 200, 215
- Art. 15, 200-1, 215
- Art. 16, 198, 200, 202-5
- defence, legitimate, and, 202-5, 215-216
- Lima, Declaration of, 1938, 307
- Locarno Treaty, 1925, 198-9, 203-6, 216
- Monroe Doctrine, 214-15
- national policy, force as an instrument of, 194-5, 197-201, 219, 254-9, 264, 266-8
- aggression and: direct, 257-60, 264, 266-7; indirect, 260
- illegality of, 194-5
- justifications for: *casus belli*, treaty creating, 198; defence, 198, 200-1; League of Nations Covenant, Art. 16, 198, 200; provocation, 198-9
- self-defence and, 219, 254-7
- nationals, protection of, 316-18
- natural disasters and, 263
- necessity, doctrine of, 185-7, 189-91, 201, 225, 226-7, 265, 268
- anticipatory action and, 225, 226-7
- intervention and, 189-90
- self-preservation and, 189, 201-2
- term, scope of, 190-1
- war on the ground of, 185-7

Force (*cont.*)

- objectives, illegal, 282-8
- independence, political, violation of, 284-6
- invasion, armed, 286-8
- territorial integrity, impairment of, 283-4
- proportionality rule, self-defence and, 227, 229-32, 259, 267, 281, 303
- definition, 229-30
- doctrine, danger inherent in, 231-2
- nuclear weapons and, 230-1, 259
- provocation, 198-9
- Reciprocal Assistance, Inter-American Treaty of, 1947, 199, 246
- reprisals, 314-15
- Rights and Duties of the American States, Declaration, 1946, 221, 246
- river, diversion of, 263
- Security Council and, 273-6, 277, 284-286, 290-5 *passim*, 297-8, 301-6, 310, 313, 314-15, 318
- Atomic Energy Council, Report of, 301-2
- authority, basis of, 273-5, 295, 313
- competence of, 275-6
- self-defence, anticipatory, 225-8, 242-4, 252-3, 258, 260, 266-7, 299, 301-2
- aggression and, 258-60, 266-7, 302
- high seas, self-defence on, 252-3
- necessity, doctrine of, 225-7
- right of, 225-8, 242-4, 258, 266-7
- self-preservation and, 225, 226-7
- United Nations Charter and, 242-4, 258
- self-defence, collective, 198, 200-1, 262, 307-8
- self-defence, legitimate, 198, 201-19
- Aggression, Convention for the Definition of, 216-17
- doctrine and practice of: 1920-9, 201-5, 264; 1930-9, 216-19, 264
- force, a justification for the use of, 198, 201, 210, 212-13
- League of Nations Covenant and, 202-5, 215-16
- Locarno Treaty and, 204-6, 216
- necessity for, determination of, 207-9
- right of, reservation, 209-12
- self-help and, 201-2
- War, General Treaty for the Renunciation of, 205-7, 209-10, 212-215
- self-defence, right of, 219-47, 265-8, 299, 301-3
- aggression and, 220-4, 244-5, 264, 266-7, 303
- anticipatory self-defence, 225-8, 242-244, 258, 266-7
- high seas, 225
- nuclear weapons and, 230-1

- proportionality rule and, 227, 229-32, 267, 281, 303
- self-help and, 223-4, 266
- term, content of, 219-25, 265-6
- United Nations Charter and, 232-47
- self-defence, term, scope and meaning of, 183, 306
- self-help, 201-2, 223-4, 266, 313
- self-preservation, 184-91, 201-2, 209, 219, 222-3, 225, 226-7, 265, 268
- aggression and, 222-3
- anticipatory action and, 225-7
- intervention and, 189-90
- necessity, doctrine of, and, 189, 201
- self-defence and, 189, 201-2, 209, 265
- term, scope of, 190-1
- war, right of, on the ground of self-preservation, 184-8, 190, 219
- shipping, restrictions on, 300
- State territory, foreign forces remaining on, 261
- United Nations Charter and, 195-7, 232-47, 254-6, 264, 269-319 *passim*
- aggression and, 244-5
- Art. 2, 232-3, 236-7, 254-6, 273-4, 277-8, 283-4, 287-8, 299, 313, 315-19
- Arts. 24-25, 275, 313
- Art. 34, 291
- Art. 35, 291
- Art. 39, 274-5, 277, 287, 291, 297, 303, 310, 317-18
- Art. 40, 286, 295, 316
- Arts. 43-47, 273, 275
- Art. 51, 232-3, 236-47 *passim*, 273, 297-300 *passim*, 302-3, 306-11 *passim*, 313
- Art. 107, 316
- independence, political, 233-5
- self-defence: anticipatory, 242-4, 258; right of, 236-41, 246-7, 281, 297-300, 302-3, 306-8
- territorial integrity, 233-5
- 'United Nations purposes', 235-6
- U.S.S.R., aggression, draft definition of, 279-80, 306
- War, General Treaty for the Renunciation of, 1928, 192-3, 195-7, 201, 205-7, 209-10, 212-14, 264
- defence, legitimate, and, 205-7, 209-210
- Monroe Doctrine and, 214-15
- reservation to, British, 212-14
- war, right of, 184-7, 190
- arbitrary right, 190
- casus belli*, 184
- necessity, doctrine of, 185-7
- self-defence, 186-7
- self-preservation, 184-8, 190
- Warsaw Pact, 308

- France, administrative law of and Court of European Communities, 324-5, 329
- Geneva Convention on the High Seas, 1958, piracy, definition of, 503
- Good faith, principle of, 35-37
- Havana, Act of, 1940, 307
- High seas, 225, 247-54, 503, 554-5: *see also* Piracy
 aircraft over, criminal jurisdiction over acts on board, 554-5
 Geneva Convention on, 1958, 253, 503
 self-defence on, 225, 247-54
 anticipatory, 252-3
 attack, use of force to repel, 250-1
 Geneva Convention on, 253
 jurisdiction over vessels and, 247-50
 piracy and, 247, 253
 Régime of, Provisional Articles on, 249
 right of, 225
 seizure of vessels in time of peace, 251-4
- Holland, seizure of the *Santa Maria* and, 496-7
- Hudson, Professor Manley Ottmer, 476-7
- Human Rights, 536-47
 European Commission of Human Rights, 536
 European Convention for the Protection of Human Rights and Fundamental Freedoms, 536-47 *passim*
 Art. 5, 537, 540-1, 546
 Art. 15, 537-8, 541-5
 Art. 17, 539-40, 545
 Art. 18, 542-3
 Art. 32, 538
 Art. 48, 538
 European Court of Human Rights: *Lawless v. The Government of Ireland (Second Phase)*, 536-47
 application, basis of, 537
 appreciation, margin of, 543-4
 assessment of the import of the case, 545-7
 derogation, notice of, 544, 545
 emergency, evidence of the existence, 543-5, 546
 European Convention and: Art. 5, 537, 540-1, 546; Art. 15, 537-8, 541-5; Art. 17, 539-40, 545; Art. 18, 542-3; Art. 32, 528; Art. 48, 538
 facts of the case, 536-7
 merits of the case, main issues, 539
 procedure: objections to, preliminary, 538; applicants' views, 538-9, 546
 proceedings, length of, 546-7
- Immunity, 380, 387-9, 395-6, 426, 549-54
 diplomatic, 549-51
 criminal proceedings and, 549-51
 United Nations Conference, 1961, on, 550-1
 waiver, 549
 vessels, State-owned, commercial, 551-4
 civil liability and, 552-3
 Convention on the Territorial Sea, 1958, on, 553
 jurisdiction over, 551
 sovereign immunity, 551-4
 United Nations Forces, members of, 380, 387-9, 395-6, 426
- Instruments, system-creating, as a source of law, 51-52
- Insurgency, piracy and: *see Santa Maria*
- International Court of Justice, 3-5, 14-23, 516-26 *passim*, 527-35: *see also* Lauterpacht, Sir Hersch, as judge and Treaties, plurilingual, interpretation of by international courts and tribunals
 decisions of, Lauterpacht's participation, 3-5
 elections to, 1960, 527-35
 parties entitled to participate, 527-8
 procedure, 527
 regular election, 529-35: balloting, 530-3; candidates, soliciting support for, 529-30; evaluation of, 533-5
 supplementary election, 528-9
 international organizations, Opinion on claims in respect of injuries to their agents, 516-26 *passim*
 judicial function, Lauterpacht's views on, 14-23
 approach to, 14-16
 decisions, bare, not sufficient, 18-19, 20
 issues involved, need to expose, 19-21
 law, development and clarification of, 17-19
non-liquet, 16-17
 refusal to pronounce on political grounds, 22-23
 technicalities, 21-22
- International law, Lauterpacht's views on, 4-11, 17-19, 23-27, 38-39, 51-52: *see also* Law of nations
 development and clarification of, 4-11, 17-19
 instruments, system-creating, as a source of, 51-52
 private and public, 38-39
 supremacy of, 23-27
- International organizations, 320-3, 447-60, 516-26
 claims by, in respect of injuries to their agents, 516-26
 aliens, private, 517, 525-6

International organizations (*cont.*)

exhaustion of local remedies and, 525-526

I.C.J. Opinion on, 516-25 *passim*

international organizations, main groups of, 517

international personnel, 517-18, 525-6

officials, foreign, 517, 525-6

responsibility of States and, 516, 524

Specialized Agencies, lodging of claim and, 525

United Nations officials, 516-26

passim: agents, injury to, 518-19;

claim, lodging of, 525; exhaustion

of local remedies and, 526; I.C.J.

Opinion on, 516-25 *passim*; obliga-

tion, breach of, on the part of host

State, 519-20; protection, claim to

receive, 520-3; reparation, mone-

tary, 524-5; service, injury attri-

butable to, 523-4

charter of, interpretation, 320-3

discussion and consultation, 321-2

estoppel and, 322

judicial, 320-2

object of, 322-3

principles of, 323

groups of, main, 517

powers of, general, 447-60: *see also*

United Nations Forces

constitutional provisions and, 447-8, 453-60

delegated, 447-8

inherent, 453-8

jurisdiction: organic, 448-9, 454;

territorial, 451-3, 454

treaties, capacity to conclude, 449-51, 453-4, 460

International tribunals: *see* Treaties, pluri-

lingual, interpretation of by inter-

national courts and tribunals

Intervention, 30-31, 158-61, 183-4, 187-191, 265, 308-11

contracts, State, and, 158-61: *see also*

State contracts

claims, nature of, 158-9

international law and, 159

pacific, 158

policy, matter of, 158

practice, in the early twentieth century, 159-61

domestic jurisdiction and, 30-31

military, by invitation, 308-11

self-defence and, 183-4, 187-91, 265:

see also Force, use of

grounds of, 187-8, 191

hostile, short of war, 190

necessity, doctrine of, 189-91

self-preservation and, 189-91

term, meaning and scope of, 187

Ireland, *Lawless v. The government of*: *see* Human Rights

Israel,

Armistice Agreements, breaches of, 280-1, 301, 303-5

U.N.E.F. and: *see* United Nations Forces

Jurisdiction, 549-51, 554-7

civil, 551-7

forces, British, jurisdiction in respect of civil offences in Germany, 555-7

immunity, sovereign, and, 551-4

criminal, 549-51, 554-5

high seas, aircraft over, 554-5

immunity, diplomatic, and, 549-51

Jus gentium: *see* Law of nations

Justi, J. H. G. von, writings of, 510

Korea, United Nations Force and, 362-70,

374, 376, 403, 411-12, 415-23, 427,

428, 430-3, 435, 437-40, 447: *see also* United Nations Forces

Lauterpacht, Sir Hersch, as judge, 1-71

cessante ratione, cessat ipsa lex, 39-43

disappearance of, 39-40

qualifications to, 4-43

contribution of, to the elucidation and development of international law, 4-11

basis of assessment, 5

legal principles, formulation and exposition of, 5-7

qualities of, as judge, 7-11: courage, 10-11; fairness, 7-9; humanity, 7, 9-10

decisions of I.C.J., participation in, 3-5

de singularis curat etiam lex, 50-51

domestic jurisdiction, 28-35

defence, right to raise as, 33-35

intervention, 30-31

province of, 28-30

'provisional theory', 31-33

reservation on matters of, 33-35

exhaustion of local remedies, 53-64

admissibility, 54, 58-59

denial of justice and, 57-58

non-exhaustion, implications of, 56, 59-64

proof, burden of, 54, 61-62

'reasonable possibility' test of, 60-61

remedy, 54, 59-64: potential, 62-64;

'reasonable possibility' test of, 60-61; what constitutes one, 54, 59-60

State rights, breach of, 54-56

good faith, principle of, 35-37

instruments, system-creating, as a source of law, 51-52

international law, 17-19, 23-27, 38-39, 51-52

- Lauterpacht, Sir Hersch (*cont.*)
 international law (*cont.*)
 development and clarification of, a
 judicial function, 17-19
 private and public, 38-39
 sources of, 51-52
 supremacy of, 23-27: *Guardianship of Infants* case, pronouncement in, 24-27; principle, clarification of, 23-24
 judicial function, 14-23
 approach to, 14-16
 decisions, bare, not sufficient, 18-20
 issues involved, need to expose, 19-21
 law, development and clarification of, 17-19
 non-liquet, 16-17
 refusal to pronounce, 22-23
 technicalities, 21-22
nemo ex sua propria injuria . . ., 46-49
 estoppel aspect, 47
 limitations on, 47-49
 principle, 46-47
nemo in re sua . . ., 43-46
 application, 43
 character of, 43-46
 opinions of, 3-5, 12-14, 70-71
 dissenting, 3-5
 extracts from, 12-14, 70-71: *ordre public*, 70-71; supervision, degree of, 12-14
ordre public, 21, 65-71
 application, propriety of, 67
 content, 66-67
 exception of, a general principle of law, 65-66
 extracts relating to, 70-71
 treaties and, 67-70
pacta sunt servanda, 28
 private international law, the place of, 38-39
quicunque exceptio invocatur . . ., 49-50
quieta non movere, 50
 reasonableness, criterion of, 35, 37
res inter alios acta, 49
 service as judge, 1-4
 States, 37-38, 54-56, 64-65
 contracts, breaches of, 64-65
 rights and interests, 37-38, 54-56:
 distinctiveness of, 37-38; local remedies rule and, 54-56
 Law of nations, 506-15
 classification of, 507
 consensus praesumptus, 507
 customary law and, 507-8
 Justi, von, writings of, 510
 Martens, writings of, 510-15
 Moser, writings of, 508-9
 natural law and, 507, 509-10, 513-15
 navigation, freedom of, 509
 Ompeteda, von, writings of, 506-8, 515
 positivist concept of law and, 506-15
 passim
 Surland, writings of, 509-10
 trade and, 508-10, 512, 514-15
 expansion, 512, 514-15
 freedom of, 508-10, 512
 treaties and, 511-13
 collections of, 511-12
 positivist concept of law and, 512
 validity of, 512-13
Lawless case (Second Phase): see Human Rights
 League of Nations, 196-8, 200-5, 215-16, 262, 295, 356-9, 428, 430, 434-5, 436, 446-7, 460, 499, 502
 Covenant, 196-8, 200-5, 215-16, 262, 295, 356-9, 436, 446-7, 460
 Art. 10, 200, 215
 Art. 15, 200-1, 215
 Art. 16, 198, 200, 202-5, 356-7
 Art. 17, 356-7
 defence, legitimate, and, 202-5, 215-216
 forces, League of Nations, and, 358-9, 436, 446-7, 460
 sanctions, economic, and, 357
 forces of, 358-9, 428, 430, 434-5, 436, 446-7, 460
 Saar, 358-9
 Vilna, 358
 Upper Amazon, 358
 piracy and, 499, 502
 Local remedies: *see* Exhaustion of local remedies
 Locarno, Treaty of, 1925, 198-9, 203-6, 216
 Marriage, nullity decrees, recognition of foreign, 557-60
 divorce, recognition of foreign, 557-8
 domicil and, 558-60
 voidable marriage and, 558-9
 Martens, writings of, 510-15: *see also* Law of nations
 Middle East, United Nations Force (U.N.E.F.) in, 374-90, 406, 408-9, 412, 420, 423-4, 427-9, 433-5, 441, 447: *see also* United Nations Forces
 Monroe Doctrine, 214-15
 Moser, writings of, 508-9
 Nations, law of: *see* Law of nations
 Natural law, 507, 509-10, 513-15: *see also* Law of Nations
 Necessity, doctrine of, 185-7, 189-91, 201, 225-7, 265, 268: *see also* Force, use of
 anticipatory action and, 225-7
 intervention and, 189-90
 self-preservation and, 189, 201-2
 term, scope of, 190-1
 war on the ground of, 185-7

- Nemo ex sua propria injuria* . . ., 46-49
Nemo in re sua . . ., 43-46
 New York Convention, 1958, 478-9, 493-4
Non-liquet, 16-17, 327
- Ompfeda, D. H. L. von, writings of, 506-8,
 515: *see also* Law of nations
 Open sea: *see* High seas
Ordre public, 21, 65-71
 Lauterpacht on: application, 67; con-
 tent, 66-67; exception of, 65-66;
 treaties and, 67-70
- Pacta sunt servanda*, 28, 175-9
 State contracts and, 175-9
 acquired rights, 176-7
 proper law of contract, 176-9
 Permanent Court of International Justice,
 76-81, 113-14: *see also* International
 Court of Justice
 treaties, plurilingual, interpretation of,
 76-81, 113-14
- Piracy, 247, 253, 496-505: *see also* High
 seas and *Santa Maria*
 criminal liability and, 503-5
 extradition and, 500, 503-5
 Geneva Convention on, 503
 insurgency and, 496-8, 500-5 *passim*
 insurgents, unrecognized, 502-3
 land, activities on, 500-1
 League of Nations Committee on, 499,
 502
 national declaration of, 501-2
 nationals, foreign, acts against, 498, 501
 political offences and, 504-5
 seizure of vessels in cases of, 247, 253
 self-defence and, 247, 253
- Positivist concept of law, law of nations
 and: *see* Law of nations
- Private international law: *see* Conflict of
 laws
- Provocation, 198-9: *see also* Force, use of
- Quieta non movere*, 50
Quicunque exceptio invocat . . ., 49-50
- Res inter alios acta*, 49
- Responsibility of States, 157-8, 516, 524
 international organizations, claims in
 respect of injuries and, 516, 524
 State contracts and, 157-8
- Rivers, diversion of, self-defence and, 263
- Saar, League of Nations forces in, 358-9,
 428, 430
- Santa Maria*, The, rebels or pirates, 496-
 505
 force, use of, and, 496
 Holland, attitude of, 496-7
 insurgency, piracy and, 496-8, 500-5
 passim
- piracy, 496-505
 criminal liability and, 500, 503-4
 extradition and, 500, 503-5
 Geneva Convention on, 503
 insurgents, unrecognized, 502-3
 land, activities on, 500-1
 League of Nations Committee on,
 499, 502
 national declaration of, 501-2
 nationals, foreign, acts against, 498,
 501
 political offences and, 504-5
 seizure of, 496
 United Kingdom, attitude of, 496-7,
 498, 501, 504-5
 United States, attitude of, 496-7, 500,
 501-2, 503
- Seas: *see* High seas and Territorial sea
- Self-defence, 183-268, 276-7, 281-2, 297-
 303 *passim*, 303-6, 464-6: *see also*
 Force, use of
 aggression and, 220-4, 244-5, 257-60,
 262, 264, 266-7, 302
 anticipatory, 225-8, 242-4, 252-3, 258,
 260, 266-7, 299, 301-2
 border raids, 301
 coercion, economic, 276-7
 collective self-defence, 198, 200-1, 307-
 308, 464-6
 definition of, 298, 304
 high seas, self-defence on, 225, 247-54
 legitimate, 198, 201-19
 Aggression, Convention for the De-
 finition of, 216-17
 doctrine and practice of: 1920-9,
 201-5, 264; 1930-9, 216-19, 264
 force, a justification for the use of, 198,
 201, 210, 212-13
 League of Nations Covenant and,
 202-5, 215-16
 Locarno Treaty and, 204-6, 216
 necessity for, determination of, 207-9
 right of, reservation, 209-12
 self-help and, 201-2
 War, General Treaty for the Re-
 nunciation of, 205-7, 209-10, 212-
 215
 passage, protection of the rights of, 300-1
 proportionality rule and, 227, 229-32,
 259, 267, 281, 303
 right of, 219-47, 265-8, 299, 301-2
 Security Council and, 303-5
 self-help and, 201-2, 223-4, 266, 313
 self-preservation and, 189, 201-2, 209,
 265
 term, meaning and scope of, 183, 306
 United Nations Charter and, 195-7,
 232-47, 254-6, 264, 281, 297-303
 passim, 306-8
 war, right of, and, 186-7

- Self-help, 201-2, 223-4, 266, 313
- Self-preservation, 184-91, 201-2, 209, 219, 222-3, 225-7, 265, 268: *see also* Force, use of
- aggression and, 222-3
- anticipatory action and, 225-7
- intervention and, 189-90
- necessity, doctrine of, 189, 201
- self-defence and, 189, 201-2, 209, 265
- term, scope of, 190-1
- war, right of on the ground of, 184-8, 190, 219
- Specialized Agencies, 525
- State contracts, 64-65, 156-82
- acquired rights, 173-5, 176
- contractual rights, 173
- pacta sunt servanda* and, 176-7
- protection of, 174-5
- compensation, breach of contract and, 170-3
- delict, remedy for, 163-6
- 'arbitrary' termination of contract, 165
- contractual remedy in delictual form, 165-6, 167-8
- reparation, 171-2
- traditional law and, 163-4
- denial of justice, 162, 166-8
- remedy, whether exclusive, 166
- term, scope of, 166-7
- exhaustion of local remedies, 166-8
- intervention, 158-61
- claims, nature of, 158-9
- international law and, 159
- pacific, 158
- policy, matter of, 158
- practice, in the early twentieth century, 159-61
- nationalization, contract or concession and, 170
- pacta sunt servanda*, 175-9
- acquired right and, 176-7
- proper law of contract and, 176-9
- proper law of, 156-7, 161, 181-2
- pacta sunt servanda*, 176-9
- parties, will of, 178, 181-2
- remedy, contractual, 161-3, 165-70, 173-7, 179-82
- delictual in form, 165-8, 181-2
- exhaustion of local remedies and, 166-8
- pacta sunt servanda*, 175-9
- possibility of: asserted, 162-3, 181; denied, 161-2
- reparation in 'delictual' action: assessment of, 169-70, 173; compensation, 171-3; forms of action, absence of, 168-9; nationalization and, 170
- rights: abuse of, 175; acquired, 173-7
- standards, national and international, 179-81
- reparation in 'delictual' action, 168-73
- assessment, 169-70, 173
- compensation, 171-3
- forms of action, absence of, 168-9
- responsibility of States and, 157-8
- standards, national and international, 179-81
- States, 37-38, 54-56, 261, 285-6
- contracts: *see* State contracts
- force, legal limits to the use of: *see* Force, use of
- Force, United Nations, and: *see* United Nations Forces
- responsibility: *see* Responsibility of States
- rights and interests, Lauterpacht on, 37-38, 54-56
- self-defence, use of force in: *see* Force, use of
- territory, foreign forces remaining on, 261, 285-6
- Suez Canal, force clearing, 354-5: *see also* United Nations Forces
- Surland, writings of, 509-10
- Territorial Sea and Contiguous Zone, Convention on, 1958, 553
- Trade, law of nations and, 508-10, 512, 514-15
- Treaties, 67-70, 412-20, 432-5, 449-51, 453-4, 560, 511-13, 548, 563-9: *see also* Treaties, plurilingual, interpretation of
- international organizations, capacity to conclude treaties, 449-51, 453-4, 460
- law of, 563-9
- nations, law of, and, 511-13
- plurilingual, interpretation of: *see* Treaties, plurilingual
- positivist concept of law and, 512-13
- statute in conflict with, 548
- United Nations Forces, treaties relating to, 412-20, 432-5: *see also* United Nations Forces
- Treaties, plurilingual, interpretation of by international courts and tribunals, 72-155: *see also* Treaties
- authentic texts, 74-123, 150-3, 155
- authentic interpretation of, 109-11, 152
- clear but discordant texts, 108-9, 152
- comparison of, 82-91, 150-1: if obscure or vague, 87-91, 150-1; if open to several interpretations, 82-87, 150
- conciliation of divergent, 82-98, 150-151: comparison, 82-91, 150-1;

Treaties, plurilingual (*cont.*)authentic texts (*cont.*)

- context, reference to, 91-94, 151;
- evidence, extrinsic, reference to, 94-97, 151; preparatory work, reference to, 97-98
- context, reference to, 91-94, 151
- defective texts, *ex officio* rectification, 106-8, 152
- definition and level of authority, clauses regarding, 74-75, 153, 155
- discordant texts, 108-9, 152
- divergent passages, 76-81
- evidence, extrinsic, reference to, 94-97, 151
- language, supremacy of texts and, 112-13, 115-17, 152-3: of the court, 112-13, 152; of the State, 115-16, 152; parties and, 116-17, 152-3
- municipal law, interpretation by reference to, 119-20, 153
- obligor, text favourable to, 113-14, 152
- obscure texts, 89-91: supremacy of clarity, 87-90; of technical terms, 90-91
- original text, interpretation by reference to, 98-106, 151-2: determination of, 98-104, 151; preparatory work and, 101-4, 151-2; presumptions in favour of, 99-101, 152; value as evidence, 104-6
- parties, intention of, 108-9, 152
- preparatory work reference to, 97-98, 101-4, 151: in conciliation of texts, 97-98, 151; in determining the original text, 101-4
- punctuation, evidential value, 120-3, 153
- ratification, supremacy of texts and, 117-19
- supremacy of, 124-36, 153-4
- translations and, 136-8, 154
- basic texts, 139-46, 154-5
 - definition and level of authority of, 139-40
 - plurality of texts, 140-6, 154-5: confusing, 145-6, 154; interpretations, wide scope for diverse, 140-1, 154; language, influence on interpretation, 143-5, 154; source of arguments, 140, 154; usefulness, limits of, 141-5, 154-5
- incorporated texts, 146-8, 155
 - by reference, 146-7, 155
 - by reproduction, 147-8, 155
- language of, 72-74, 112-13, 115-17, 152-3
- Latin, 74
- modern usage, 72-74

supremacy of texts and, 112-13, 115-117, 152-3

obligor, text favourable to, 113-14

official texts, 123-36, 153-4

authentic texts, supremacy of, and, 124-36, 153-4: absolute, 124-5, 128, 153; cases relating to, 128-36;

open to interpretation, 125-8, 128-136, 153-4; parties, will of, 126-8

definition and level of authority, 123-4

translations, official, and, 136-8, 154

parallel passage, 148-50, 155

P.C.I.J., rulings on the interpretation of,

76-81, 113-14

divergent passages: restrictive interpretation, 76-78, 80; words, interpretation of, 78-81

obligor, text favourable to, 113-14

translations, official, 136-8, 154

unequal authority texts, 123-38, 153-4

authentic texts, supremacy of, 124-36,

153-4: absolute, 124-5, 128, 153;

cases relating to, 128-36; open to interpretation, 125-8, 128-36, 153-154; parties, will of, 126-8

official texts, divergences between authentic and, 124-36, 153-4

translations, divergences between texts and, 136-8, 154

Union of Soviet Socialist Republics, 279-280, 306, 308

aggression, draft definition on, 279-80, 306

Warsaw Pact, 308

United Kingdom, 198-9, 204-6, 212-14,

216, 496-8, 501, 504-5

Locarno Treaty, 1925, 198-9, 204-6, 216

Santa Maria, attitude to the seizure of, 496-8, 501, 504-5

United Nations, inherent power of, to establish military forces, views on, 463-8

War, General Treaty for the Renunciation of, British reservation to, 212-14

United Nations, 195-7, 232-47, 253-6,

264, 273-8 *passim*, 283-319 *passim*,

353-6, 359-74, 376, 403, 409,

411-12, 428, 435-47, 460-1, 464,

467-8, 516-26, 527-35 *passim*: see

also Force, use of, United Nations

practice and United Nations Forces

agents, injuries to, claims, 516-26 *passim*

claim, lodging of, 525

exhaustion of local remedies and, 526

host State, breach of obligation by, 519-20

I.C.J., ruling on, 516-25 *passim*

injury to: as agents, 519; while performing official duty, 518-19

United Nations (*cont.*)agents (*cont.*)

- protection, claim to receive, 520-3:
 - 'agent', meaning of the term, 522-3;
 - claim, basis of, 520-1; scope of, 521-2
- reparation, monetary, 524-5
- service, injury attributable to, 523-4
- Charter, 195-7, 232-47, 254-6, 264, 273-8 *passim*, 283-8 *passim*, 297-319 *passim*, 356, 359-62, 409, 411-412, 436-47, 460-1
- Art. 2, 232-3, 236-7, 254-6, 273-4, 277-8, 283-4, 287-8, 299, 313, 315-19 *passim*
- Arts. 24-25, 275, 313
- Art. 34, 291
- Art. 35, 291
- Art. 39, 274-5, 277, 287, 291, 297, 303, 310, 317-18
- Art. 40, 286, 295, 316
- Arts. 42-47, 273, 275, 359-62
- Art. 51, 232-3, 236-47 *passim*, 273, 297-303 *passim*, 306-8, 310-11, 313
- Art. 107, 316
- competence to establish military forces and, 436-47, 460-1
- Congo Force (O.N.U.C.) and, 441-7:
 - see also* United Nations Forces
- control over forces and, 409, 411-12
- Field Service, U.N., and, 437
- force, legal limit to the use of, 273-8, 283-8, 297-319 *passim*: *see also* Force, use of
- Korea, forces in, 437-40, 447: *see also* United Nations Forces
- Middle East Force (U.N.E.F.), 441, 447: *see also* United Nations Forces
- Military Staff Committee and, 360
- self-defence, 195-7, 232-47, 254-6, 264
- Uniting for Peace Resolution and, 440-1, 447
- Collective Measures Committee, 371-4, 376, 464, 467-8
- Congo, U.N. Force in: *see* United Nations Forces
- Diplomatic Intercourse, United Nations Conference on, 1961, 550-1
- Economic Commission for Europe, United Nations, 478, 486-7
- Field Service, 353-4, 437
- Guard Force, 353
- High Seas, Convention adopted by the U.N. Conference, 1958, 253
- I.C.J., elections to, 1960, 527-35 *passim*
- General Assembly rules and, 527-8, 530-1, 533, 534
- Security Council and, 528-30, 532-4
- Korea, forces in: *see* United Nations Forces

- Middle East, U.N. Force in (U.N.E.F.):
 - see* United Nations Forces
- Military Staff Committee, 360-2, 409, 411
- Security Council, 273-7, 284-98 *passim*, 301-6 *passim*, 310, 313-15, 318, 360, 362-70, 528-30, 532-4
- Atomic Energy Council, Report to S.C., 301-2
- authority, basis of, 273-5, 295, 313
- competence of, 275-6
- Congo, military assistance to, 390-2
- force, use of: legal limits, 273-7, 284-98 *passim*, 301-10 *passim*, 313-315, 318; under U.N. command, 399-401
- I.C.J., elections to, 528-30, 532-4
- Korea, forces in, 362-70 *passim*: *see also* United Nations Forces
- Military Staff committee's recommendations and, 360-1
- Uniting for Peace Resolution and, 370-1
- Suez Canal, forces clearing, 354-5
- truce observation missions, 354-5
- Uniting for Peace Resolution, 370-3, 374, 376, 403, 428, 435, 440-1, 447, 464, 467
- United Nations Forces, 351-475
 - Charter, military forces and, 356, 359-362, 409, 411-12, 436-47, 460-1
 - Arts. 42-47, 359-62
 - competence to establish military forces and, 436-47, 460-1
 - Congo Force (O.N.U.C.), 441-7
 - control, operational, 409, 411-12
 - Field Service, United Nations, 437
 - Korea, force in, 437-40, 447
 - Middle East Force (U.N.E.F.), 441, 447
 - Military Staff Committee, 360
 - States, Member, rights and duties of, 359-60, 362
 - Uniting for Peace Resolution, 440-1, 447
- civilian and semi-military forces, 352-6
- civilian force, 355-6
- Field Service, 353-4, 437
- Guard Force: Headquarters, 353; Palestine, 353
- military observation missions, 354-5
- Suez Canal clearing force, 354-5
- truce observation missions, 354-5
- Trygve Lie's proposal, 353
- claims against, 420-3, 431
- Collective Measures Committee, 371-4, 376, 464, 467-8
 - reports of, 371-4, 411-12
- permanent U.N. Force and, 403-4
- command, 364, 366-70 *passim*, 376-8,

United Nations Forces (*cont.*)command (*cont.*)

381-2, 385, 393-5, 406-8, 411-12, 415, 421, 427-9

competence to establish, without constitutional provisions, 435-71

Charter and, 436-47, 460-1: Congo Force, 441-6, 447; Middle East Force, 441, 447; Korea, force in, 437-40, 447; United Nations Field Service, 437; Uniting for Peace Resolution and, 440-1, 447

League of Nations Covenant and, 436, 446-7, 460

organizations, intergovernmental, general powers of, 447-60: conferences, international, 453, 454; constitutional provisions and, 447-448, 453-60; 'diplomatic' representatives, 453, 454; I.C.J. and, 454-5; jurisdiction: organic, 448-9, 454, territorial, 451-3, 454; limitations of, 458-60; power: delegated, 447-8, inherent, 454-8; States and, 459-60; treaties, capacity to conclude, 449-51, 453-4, 460

status, external, of established forces, 471-5: responsibility for, international, 473-5; States, Member, and, 471, 473; States, non-member, and, 471-5

United Nations, inherent power of, 460-71: commander, appointment of, 464-7; General Assembly, 470-471; Security Council, 469-70, 471; self-defence, collective, and, 464-6; State, host, and, 462-3, 471; States, Member, and, 461-3, 471; States, participating, and, 462-3; United Kingdom views on, 463-8

Congo, U.N. Force in (O.N.U.C.), 390-402, 407-8, 412-15, 423-9, 441-7

Civilian Operations, Chief of, 394

command, 393-5, 407-8, 428-9

competence to establish, 441-7

compositions, 493

conflicts, internal, and, 401-2

costs, 394, 428

establishment of, 390-2

functions, 396-8

international character of, 407-8, 429

military operations, 398-401

organizations, 392-4

privileges and immunities, 395-6, 426

purpose, 391, 392

rights, protection of, 423, 424-7

Secretary-General, authority of, 391-395, 407-8, 412-15

State, host, powers of, 407-8, 413-15, 427, 428-9

States, participating, rights and duties of, 407-9, 413-15, 423, 428, 433-4

status, 392-3

Status Agreement, conclusion of, 392

strength, 394

treaties relating to, 412-15

cost, 385-6, 394, 428

immunities, privileges and, 380, 387-9, 395-6, 426

Korea, forces in, 362-70, 374, 376, 403, 411-12, 415-23, 427, 428, 430-3, 435, 437-40, 447

claims against, 421-3

command: operational, 411-12; Unified, 363-4, 366, 415, 421; United Nations, 364, 366-70 *passim*, 415, 421, 427

competence to establish, 437-40, 447

General Assembly and, 363-4, 366-8

Korean forces and, 365

rights, protection of, 427

Security Council and, 362-3

State, host, 428

States, participating, 431, 432-3

treaties relating to, 415-20, 432-3

Unified Command, 363-4, 366, 415, 421

United Nations Command, 364, 366-370 *passim*, 415, 421, 427

United States and, 364-5, 415, 430-3, 435

Uniting for Peace Resolution and, 374, 411

League of Nations, 356-9, 428, 430, 434-6, 446-7, 460: *see also* League of Nations

Covenant, military forces and, 356-9, 436, 446-7, 460

forces of, 358-9, 428, 430, 434-5

Middle East, U.N. Force in (U.N.E.F.), 374-90, 406, 408-9, 412, 420, 423-4, 427, 428-9, 433-5, 441, 447

air force, 379

claims against, 420-1

command, 376-8, 381-2, 385, 406, 428-9

competence to establish, 441, 447

composition, 378, 381, 383-4

costs, 385-6, 428

discipline, 387

equipment, 376

establishment of, 375

flag, 379, 380

international character of, 380, 383, 389, 429

privileges and immunities, 380, 387-9

purpose, 375-6

recruitment, 377, 383-4

regulations relating to, 380-3

rights and duties of, 382-3, 389, 423-4

United Nations Forces (*cont.*)Middle East (*cont.*)

- rights, protection of, 423-4, 427
- sea transport, 379
- Secretary-General, authority of, 381, 412, 420
- State, host, powers of, 390, 406, 427, 428
- States, participating, functions and powers of, 380, 383-90, 408-9, 423, 424, 428-9, 433-5
- status, 379-80, 387-90
- treaties relating to, 412
- uniforms, 378-9, 380
- Military Staff Committee, 360-2, 409, 411
- establishment, 360
- Report on General Principles Governing the Organization of the Armed Forces, 360-2, 409, 411
- status, 360
- national contingents, 359, 369-70, 371-374, 378, 392, 409-10
- Collective Measures Committee on, 371-4
- control over, 369-74, 378, 385, 409-10
- obligation to contribute, 471
- recruitment, 359, 383-4
- status and privileges, 387-9
- Uniting for Peace Resolution on, 371
- operational control, 406-12, 428, 435
- Charter and, 409, 411-12
- national jurisdictions and, 409-10
- State, host, 406-8
- States, Member, 411-12
- States, participating, 407-10
- United Nations, 406-12, 428
- permanent United Nations Force, question of the establishment of, 402-4
- responsibility for, general, 404-6, 428-431, 473-5
- State, host, 405, 406
- States, Member, 405
- States, participating, 405-6, 429, 431
- United Nations, 405-6, 423, 429-31
- rights, protection of, 423-8, 435
- Security Council, military forces and, 360, 362-70
- Congo, military assistance to, 390-2
- force, use of, by troops under U.N. command, 399-401
- Korea, forces in, 362-70 *passim*
- Military Staff Committee's recommendations and, 360-1
- Uniting for Peace Resolution and, 370-1
- State, host, rights and duties of, 390, 405-8, 413-15, 427-9, 462-3, 471
- States, Member, rights and duties of, 357, 359-62, 369-73, 405, 411-12, 417-18, 434-5, 461-3, 471, 473

- States, participating, rights and duties of, 380, 383-90, 396, 405-10, 413-415, 418-20, 421-4, 428-9, 431-5, 462-3
- status, 379-80, 387-90, 392-3
- Suez Canal, force clearing, 354-5
- treaties relating to, negotiation and conclusion of, 412-20, 432-5
- League of Nations, 432-5
- State, host, 413-15
- States, Member, 417-18, 434-5
- States, participating, 413-15, 418-20, 432-4
- United Nations, 412-16, 419
- United Nations Command (Korea), 415-20
- United States, 415-20
- Uniting for Peace Resolution, 370, 374, 376, 403, 428, 435, 440-1, 447, 464, 467
- provisions of, cited, 370-1, 464
- United States of America, 193-4, 199, 214-215, 221, 246, 362-70, 374, 376, 403, 411-12, 415-23, 427, 428, 430-3, 435, 437-40, 447, 496-7, 500-3
- American States, Rights and Duties of, Draft Declaration, 1946, 221, 246
- Anti-War Treaty of Non-Aggression, 1933, 193-4
- Inter-American Treaty of Reciprocal Assistance, 1947, 199, 246
- Korea, United States and United Nations forces in, 362-70, 374, 376, 403, 411-12, 415-23, 427, 428, 430-433, 435, 437-40, 447: *see also* United Nations Forces
- Monroe Doctrine, 214-15
- Santa Maria*, seizure of, attitude to, 496-7, 500-3: *see also Santa Maria*
- Uniting for Peace Resolution, 370-4, 376, 403, 428, 435, 440-1, 447, 464, 467: *see also* United Nations Forces
- Upper Amazon, League of Nations forces in, 358
- Vilna, League of Nations forces in, 358
- War, 184-90, 192-3, 195-7, 201, 205-7, 209-10, 212-15, 264
- Anti-War Treaty of Non-Aggression, 1933, 193-4
- belligerent rights, 311-13
- casus belli*, 184, 198
- General Treaty for the Renunciation of, 1928, 192-3, 195-7, 201, 205-7, 209-10, 212-15, 264
- defence, legitimate, and, 205-7, 209-210

War (*cont.*)

Monroe Doctrine and, 214-15
reservations to, British, 212-14
hostile measures short of, 188-90
right of, 184-7, 190
arbitrary, 190
casus belli, 184
necessity, doctrine of, and, 185-7

self-defence and, 186-7

self-preservation and, 184-8, 190

Warsaw Pact, 308

Wills, immovables, succession to, 560-2

Finance Act, 1949 and, 560-1

lex situs and, 560-2

proper law and, 561-2



PRINTED IN GREAT BRITAIN
AT THE UNIVERSITY PRESS, OXFORD
BY VIVIAN RIDLER
PRINTER TO THE UNIVERSITY

AB 2 8 MAR 1974
-1

1977 - ~~||||~~

1978 - ~~||~~

1979 - 1

1982 - ~~|||~~

83 - ~~||||~~

85 - 1

86 - 11

87 - 11

89 111

91 - 1

